Supreme Court, U.S.
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90-1376

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ST. JOHN'S HOSPITAL and DR. SHARI FITZGERALD,

Petitioners,

v.

ERICA HENRY, by her Mother and Next Friend, JANE HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is as follows:

Did the Supreme Court of Illinois deprive Petitioners of their constitutional right to due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution by upholding a lower court's post-trial rulings which *increased* the jury's verdict against Petitioners from $595,821.13 to $5,511,759.00?

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In The

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ST. JOHN'S HOSPITAL and DR. SHARI FITZGERALD,

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ERICA HENRY, by her Mother and Next Friend, JANE HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 138 Ill.2d 533 and 563 N.E.2d 410 (1990) (App. 1 at pp. 1-22). The opinion of the Supreme Court of Illinois reversed the opinion of the Appellate Court of Illinois, Fourth District, which is reported at 180 Ill. App. 3d 558 and 536 N.E.2d 221 (1989) (App. 2 at pp. 23-41). Petitioners filed a Petition for Rehearing in the Supreme Court of Illinois (App. 13 at pp. 68-70). The Supreme Court of Illinois issued an order denying the Petition for Rehearing (App. 4 at p. 54).

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 19, 1991. Petitioners' timely Petition for Rehearing was denied by the Supreme Court of Illinois on November 30, 1991, and the modified judgment of the Supreme Court of Illinois was entered on that date. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are contained in Article 1, §13 of the Illinois Constitution and §1 of Amendment XIV of the United States Constitution as follows:

> "The right of trial by jury as heretofore enjoyed shall remain inviolate." (Illinois Constitution Art. 1, §13)
>
> "Section 1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (United States Constitution, Amendment XIV)

STATEMENT OF THE CASE

Respondent, Erica Henry, by her Mother and Next Friend Jane Henry, instituted this action in the Illinois Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois. Respondent sought to recover for injuries

Erica allegedly sustained from the drug Marcaine, which was administered to Jane shortly before she gave birth to Erica.

The Parties

Respondent's complaint alleged theories of medical malpractice and products liability against the following defendants:

1) Dr. Shari Fitzgerald and her employer St. John's Hospital[1] (hereinafter "Petitioners") on the theory that Dr. Fitzgerald should not have administered Marcaine to Erica's mother;

2) Sterling Drug, Inc. and Breon Laboratories, Inc. (hereinafter collectively referred to as "Sterling/Breon") the manufacturer and distributor of Marcaine, on a theory of strict product liability for marketing an unreasonably dangerous drug, and on a theory of willful and wanton conduct on the ground that Sterling/Breon knew of the dangers of Marcaine, but failed to adequately warn physicians, hospitals and other users of the danger.[2]

Jury Not Instructed On Joint And Several Liability, Nor Given A Joint And Several Liability Verdict Form

Both the Illinois common law and the Illinois Contribution Act, Ill. Rev. Stats., Ch. 70, §301 *et seq.* recognize

[1] St. John's Hospital is incorporated as St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, an Illinois not-for-profit corporation. Its parent company is Hospital Sisters Services Inc.

[2] Respondent also sued her pediatrician, Dr. Thomas O'Hern, but he received a directed verdict at the close of the evidence and had no further involvement in the case.

the principle of joint and several liability whereby each defendant, regardless of his percentage share of fault, remains fully liable to the plaintiff for 100% of the total compensatory damages. Accordingly, the standard Illinois jury instructions found in the Illinois Pattern Instructions (I.P.I.) include instructions and verdict forms reflecting this joint and several liability principle. *See* I.P.I. 2d §14.04.[3]

Nevertheless, even though Sterling/Breon had filed a contribution claim against Petitioners and contribution instructions were given, the instant jury was told to "decide each defendant's case separately as if each were a separate lawsuit" (R. C3287) and was never instructed on the principle of joint and several liability. Nor was the jury ever given a joint and several liability verdict form. Instead, Respondent's counsel drafted and the trial court submitted to the jury one plaintiff's verdict form that instructed the jury to allocate each defendant's "pro-rata share of compensatory damages" in "find[ing] *for the plaintiff*" (emphasis added) (App. 5 at p. 55).

The reason why Respondent never tendered joint and several liability instructions or verdict forms was never stated of record, but the tactical reason was obvious. Respondent's counsel focused almost his entire case on Sterling/Breon, even going so far as to argue in closing argument that "I think that Dr. Fitzgerald is as much a victim of that drug company as the child is" (R. Vol. XXV, p. 33). Respondent's counsel apparently concluded that instructing the jury that Petitioners would be fully respon-

[3] This pattern instruction provides: "If you find that the plaintiff is entitled to recover against more than one defendant, then your verdict against those defendants whom you find to be liable must be in one, single sum."

sible for the entire amount of any compensatory damage award, might have reduced the compensatory damages that the jury was otherwise willing to award against Sterling/Breon.

Separate Jury Verdicts Returned In Favor Of Plaintiff And Against Petitioners And Sterling/Breon For Separate Percentages Of Plaintiff's Compensatory Damages

In accordance with the jury verdict form asking the jury to determine each defendant's separate "pro-rata share of compensatory damages" in their verdict for the plaintiff, the jury returned its separate verdicts in favor of plaintiff and against Petitioners and against Sterling/Breon as follows:

> "We, the jury, find for the plaintiff and against the following defendants and determine their pro rata share of compensatory damages in the following amounts:
>
> | | |
> |---|---|
> | Sterling Drug, Inc. | 46.5% |
> | Breon Laboratories, Inc. | 46.5% |
> | St. John's Hospital/ Dr. Shari Fitzgerald | 7.0% |
> | TOTAL | 100.0%" |
>
> * * * * *
>
> "We, the Jury, find for the plaintiff and assess compensatory damages as follows:
>
> | | |
> |---|---|
> | Disability | $6,000,000.00 |
> | Disfigurement | 1,000,000.00 |
> | Pain & Suffering | 1,500,000.00 |
> | Medical Expenses | 1,500,000.00 |
> | Total | $10,000,000.00" |

(App. 5 at p. 55)

In addition, the jury returned a $7,000,000 punitive damage award against Sterling/Breon only (App. 5 at p. 57).

Initial Post-Trial Proceedings Recognize The Separate Nature Of The Verdicts

Judgment was entered in favor of Respondent on the jury's separate pro-rata verdicts in the exact form of the verdict itself, awarding Respondent 7% of her total compensatory damages against Petitioners and 93% of her total compensatory damages against Sterling/Breon (App. 5 at p. 57). Subsequently, the total compensatory damages were reduced from $10 million to $8,511,759.00 in a letter order "granting judgment for the plaintiff and against the defendants for the sum of $8,511,759.00 for compensatory damages" (App. 5 at pp. 56 and 58).

Thereafter, in accordance with the separate nature of the jury's pro-rata verdicts, the parties and the court continued to treat the verdict and judgment against Petitioners for 7% of the compensatory damages as a separate and distinct verdict from the verdict against Sterling/Breon for 93% of the compensatory damages. Accordingly, the trial court approved appeal bonds limited to each defendant's share of the compensatory damages. The court approved Petitioners' appeal bond in the amount of $625,000 representing its pro-rata 7% share of Respondent's total compensatory damages plus anticipated post-judgment interest (App. 6 at pp. 59-60). Likewise, the court approved a separate appeal bond for Sterling/Breon in the amount of $16,500,000 representing its 93% share of the compensatory damage award plus expected post-judgment interest plus the punitive award (R. C2842).

Respondent And Sterling/Breon Enter Into Settlement Agreement

While the case was on appeal, Respondent and Sterling/Breon entered into a settlement of the compensatory damage and punitive damage judgments against Sterling/Breon. Respondent received a structured settlement package costing Sterling/Breon $3,350,000 (R. C2888-2891). As part of the settlement, Respondent and Sterling/Breon sought a finding from the Circuit Court that the settlement was in "good faith" under the Illinois Contribution Act, Ill. Rev. Stat., Ch. 70, §301 *et seq.*, thereby extinguishing any contribution claims by or against Sterling/Breon (R. C2888).

Since the Contribution Act is premised on a theory of joint and several liability, Petitioners immediately filed a special and limited appearance, voicing their concern and constitutional objections should Respondent intend to use the settlement as a premise for the assertion that Petitioners were jointly and severally liable for that portion of the compensatory damage award against Sterling/Breon that remained unpaid after the settlement (App. 7 at pp. 61-63). Respondent objected to Petitioners' standing, and Petitioners' objections to the good faith finding were overruled (App. 5 at p. 58). Petitioners attempt to appeal from the good faith finding was dismissed as premature (R. C2900).

The Appellate Court Expressly Recognizes The Separate Nature Of The Judgment Against Petitioners For 7% Of Compensatory Damages

On appeal, Petitioners sought outright reversal of the judgment on the jury's verdict or a new trial. The Appellate Court ultimately rejected all of Petitioners' appeal

arguments and affirmed. In view of the Sterling/Breon settlement, Petitioners filed a Petition for Rehearing in the Appellate Court expressly requesting the Appellate Court to acknowledge that the affirmance did not change or increase the jury's verdict finding Petitioners' liable for only 7% of the total compensatory damages (App. 9 at pp. 68-70).

The Appellate Court complied with Petitioners' request and filed an amended opinion stating that it affirmed Petitioners' "responsibility for 7%" of the compensatory damages (159 Ill. App. 3d at 735) (App. 3 at p. 53). Respondent filed no objection and sought no further appeal from this amended affirmance order for 7% of the compensatory damages.

Increased Judgment Entered Against Petitioners For $5,511,759.00 Plus Interest

After the Appellate Court had affirmed Petitioners' "responsibility for 7%" of the compensatory damages and Petitioners' petition for leave to appeal to the Illinois Supreme Court had been denied, Petitioners tendered Respondent a check in the amount of $715,559.09, representing Petitioners' 7% share of the compensatory damage award plus post-judgment interest at the statutory rate (R. C2954).

In response, Respondent filed citation proceedings against Petitioners and Petitioners' umbrella insurance carrier asserting that Petitioners were jointly and severally liable for $5,511,759—the amount of the compensatory damage verdict against Sterling/Breon that remained unpaid after the Sterling/Breon settlement (R. C2922).

Petitioners responded by filing a formal petition for entry and satisfaction of the judgment against Petitioners pursuant to the jury's original separate verdict for 7%

of the compensatory damages, and a petition for post-trial relief from judgment pursuant to the Illinois Code of Civil Procedure, Ch. 110, §2-1401, to the extent any prior judgment entered on the jury verdicts failed to comply with the jury's separate verdicts (R. C2945). Petitioners urged that their right to a jury trial under the Illinois Constitution (Article I, §13) and the Fourteenth Amendment of the United States Constitution prohibited the entry of any judgment against Petitioners in excess of the separate "7% of compensatory damages" verdict returned by the jury (App. 10 at pp. 71-73).

The Circuit Court denied all of Petitioners' motions and objections and entered a new order that expressly: (a) found that Petitioners were jointly and severally liable for all the compensatory damages found by the jury; and (b) entered a new judgment against Petitioners in the total amount of $5,511,759.00 plus interest for a total judgment of $7,040,502.00 (App. 11 at pp. 74-75).

The Appellate Court Reverses The Increased Judgment Against Petitioners

On March 17, 1989, the Appellate Court of Illinois reversed the new $5,511,759.00 judgment against Petitioners and held that Respondent had no right "to enforce that part of the verdict attributable to Sterling/Breon" against Petitioners (180 Ill. App. 3d at 569) (App. 2 at p. 35).

The Illinois Supreme Court Reverses The Appellate Court And Reinstates The Increased Judgment Against Petitioners

On September 19, 1990, the Illinois Supreme Court issued an opinion wherein the majority of the court reversed the Appellate Court and reinstated the increased

$5,511,759.00 judgment against Petitioners. The Supreme Court cited the Illinois law of joint and several liability, brushing aside Petitioners' contention that any judgment against Petitioners for more than the jury's verdict of 7% of the compensatory damages was "an improper post-judgment reallocation of the jury verdict" (138 Ill. 2d at 549) (App. 1 at p. 14). Supreme Court Justice Ryan filed a vigorous dissent, concluding that the "unexplained maneuvering" between Respondent and Sterling/Breon was a misuse of the Illinois Contribution Act which resulted in an "unconscionable" and "inequitable" result wholly inconsistent with the jury's verdict against Petitioners for only 7% of the compensatory damages (138 Ill. 2d at 550-556) (App. 1 at pp. 16-22).

Rehearing was denied by the Illinois Supreme Court and a modified opinion was entered on November 30, 1990 (App. 4 at p. 54). Accordingly, Petitioners now file this Petition for Writ of Certiorari since this Court is the court of last resort for the constitutional deprivation which has occurred.

How The Constitutional Questions Were Raised

The constitutional questions herein did not arise until Petitioners learned that Respondent and Sterling/Breon had entered into a settlement for substantially less than the judgment against Sterling/Breon and sought approval of the settlement as well as a "good faith" finding from the Circuit Court that would extinguish any contribution claims by or against Sterling/Breon. Petitioners immediately filed a special and limited appearance voicing their concern and constitutional objections should Respondent plan to later assert that Petitioners were jointly and severally liable for the unpaid portion of the compensatory

damage award (App. 7 at p. 61). The Circuit Court overruled Petitioners' objections (App. 5 at p. 58). Petitioners next filed a Petition for Instructions in the Appellate Court, again voicing constitutional concerns (App. 8 at p. 64). The Appellate Court overruled the Petition (App. 8 at p. 66). Thereafter, the Appellate Court affirmed the judgment against Petitioners, and Petitioners filed a Petition for Rehearing expressing the same concerns and asking the Appellate Court, if it denied the Petition, to clarify that it was only affirming Petitioners' "responsibility for 7%" of the compensatory damage award (App. 9 at pp. 68-70). The Appellate Court modified its opinion and expressly affirmed Petitioners' "responsibility for 7%," implicity accepting Petitioners' constitutional arguments (159 Ill. App. 3d at 735) (App. 3 at p. 53).

Petitioners next filed a Petition for Entry of Judgment or Relief from Judgment raising the same constitutional concerns (App. 10 at pp. 71-73). The Circuit Court denied the Petition and *for the first time* entered an Order finding Petitioners liable for the unpaid portion of the jury's separate verdict against Sterling/Breon. Accordingly, the Circuit Court entered a new judgment against the Petitioners for $5,511,759.00 plus interest for a total award of $7,040,502.00 (App. 11 at p. 74). Petitioners appealed from this new *increased* judgment, and in their Appellant's Brief urged that affirmance of this judgment would be inconsistent with the Fourteenth Amendment (App. 12 at p. 76). The Appellate Court reversed the Circuit Court citing different grounds (180 Ill. 2d 558) (App. 2 at pp. 23-41). Respondent then appealed to the Illinois Supreme Court from the Appellate Court decision, and the Illinois Supreme Court reversed the Appellate Court and affirmed the judgment against Petitioners for the unpaid portion of the jury's 93% compensatory damage verdict against Sterling/Breon (138 Ill. 2d 533) (App. 1 at pp. 1-22). Peti-

tioners filed a Petition for Rehearing arguing that they had been denied their rights as guaranteed by the Fourteenth Amendment (App. 13 at p. 77). The Illinois Supreme Court denied the Petition, implicitly rejecting Petitioners' arguments (App. 4 at p. 54). This petition for a writ of certiorari followed.

ARGUMENT

THE ILLINOIS SUPREME COURT OPINION, UPHOLDING THE LOWER COURT'S TENFOLD INCREASE IN THE JURY'S VERDICT AGAINST PETITIONERS, VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioners recognize that this Court rarely issues a writ of certiorari to review a state court tort case. However, it is equally rare for a court to do what the Illinois Circuit Court did here when, after the jury trial in this medical malpractice case was over and the jury was discharged, it *increased* the jury's verdict against Petitioners and the judgment thereon from $595,812.13 to $5,511,759.00. It is even more rare for a court of review to approve such a procedure. But the Illinois Supreme Court did precisely that. In an opinion that the dissenting Supreme Court Justice aptly labeled "terribly wrong" and "unconscionable," the Illinois Supreme Court reversed the Appellate Court and reinstated the increased $5,511,759.00 award against Petitioners for an amount 10 times the jury's verdict. This result is not only unjust and unconscionable, it is unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

A. The Fourteenth Amendment Prohibits States, Including State Courts, From Arbitrarily Denying Their Citizens The Rights Granted Them By State Law.

The Fourteenth Amendment of the United States Constitution guarantees the right to due process and equal protection of the laws. Denial of these federal guarantees can be accomplished by a state court. As this Court noted in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930):

> The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

See also, Shelley v. Kramer, 334 U.S. 1, 15 (1948), and the cases cited therein.

While the United States Constitution affords the individual certain rights, "[s]tate law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Once the state creates such rights they are entitled to due process protection (*Id.*) A state created right is entitled to the protection of the federal due process clause. *Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1205 (7th Cir. 1983).

State law rights must so be applied "impartially." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979). Accordingly, an individual may be deprived of his right to equal protection where a state law fair on its face is applied unequally. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

Under Illinois law, the Illinois Constitution provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." (Ill. Const. Art. I, §13). The Seventh

Amendment of the United States Constitution affords this same right to trial by jury in the federal courts. As stated by this Court in *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935):

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, §1779), ". . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

The *Dimick* Court further noted that this right to a jury trial includes the fundamental "right to the verdict of the jury." *Ibid.* at p. 487.

B. The Illinois Supreme Court Denied Petitioners' Their "Right To The Verdict Of The Jury."

1. The Jury Did Not Return A Joint And Several Verdict.

The only jury verdict in favor of Respondent and against Petitioners in this case was a verdict expressly finding that Petitioners were liable to Respondent for 7% "pro-rata share of compensatory damages," and that the total amount of compensatory damages was $10 million, later reduced by remittitur to $8,511,759.00.

After the trial was over and the jury had been discharged, all parties, the trial court, and the appellate court continued to treat the verdicts as the separate verdicts they were. Specifically, the trial court accepted Petitioners' appeal bond in the amount of 7% of the total compensatory award plus interest on said 7%, even though under joint and several liability principles Petitioners would have been obligated to bond the entire award. Likewise, the Appellate Court's final judgment order carefully noted that it was affirming Petitioners' "responsibility for 7%" of the compensatory award.

2. The Jury's Verdict Is What It Is And It May Not Constitutionally Be Increased To Comport With Law Which The Jury Was Never Given And Did Not Follow.

The plaintiff's verdict form submitted to the jury, permitting the jury to return a verdict for plaintiff by allocating different percentages of the compensatory damages award to each defendant, did *not* comport with the Illinois general rule of joint and several liability precluding the apportionment of compensatory damages among joint tortfeasors. *Coney v. J.L.G. Industries*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983). Yet, it was Respondent's counsel who drafted the verdict form permitting—indeed requiring—apportionment in the verdict finding in favor of Respondent. Furthermore, Respondent's counsel did not submit and the trial court did not give the standard Illinois pattern jury instruction advising the jury of the joint and several liability principle. Nor was any joint and several liability verdict submitted.

But even if Respondent had not been the one responsible for the jury's failure to return a joint and several verdict, the constitutional principle would remain the same,

i.e., the jury's verdict is what it is and it cannot be judicially increased to comport with any view of what the jury should have done.

Thus, in *Dimick v. Schiedt*, *supra*, this Court held that an increase in the jury's verdict in a personal injury case violated the parties' constitutional right to a jury trial even when done with the consent of the defendant in an attempt to correct a verdict "made by a jury which has acted improperly." 293 U.S. at 487.

Prior to the instant case, Illinois courts had reached the same conclusion based on every Illinois citizen's constitutional right to a jury trial. In *Koltz v. Jahaaske and Reher*, 312 Ill. App. 623, 38 N.E.2d 973 (1942), a personal injury case was tried against multiple defendants on a joint and several liability theory. Nevertheless, the jury returned separate and different amounts against various defendants. The lower court, relying on the principle of joint and several liability, "corrected" the verdicts by making each verdict equal to the highest damage award returned by the jury. The Appellate Court found such a result "violative of the constitutional guaranty of trial by jury" and reversed, stating:

> The verdict is the basis for the judgment to be rendered thereon, and a *court cannot render judgment* in an action for unliquidated damages, *for a greater amount than it is authorized to do by the verdict.* The rule that a trial court is powerless to reduce the damages fixed by a jury in its verdict in an action for unliquidated damages, and render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to such reduction, is so generally recognized that it may be said to be of universal application. Likewise, a trial court is without power to arbitrarily increase the verdict of a jury in a tort action which is based upon unliquidated

damages, without the consent of the party to be unfavorably affected by such increase. The reason for the above rule is that such action on the part of the court in arbitrarily reducing or increasing the damages fixed by the jury in its verdict without the consent of the party unfavorably affected by such increase or decrease, *would be violative of the constitutional guaranty of trial by jury. American Ry. Express Co. v. Bender*, 20 Ohio App. 436, 152 N.E. 197; *Dimick v. Schiedt*, 293 U.S. 474, 55 S. Ct. 296, 79 L.Ed 603, 95 A.L.R. 1150; *Gaither v. Wilmer*, 71 Md. 361, 18 A. 590, 5 L.R.A. 756, 17 Am. St. Rep. 542; *Fidelity Storage Co. v. Kingsbury*, 65 App. D.C. 69, 79 F.2d 705; *Rafferty v. Public Service Interstate Transp. Co.*, 177 A. 357, 13 N.J. Misc. 80. (312 Ill. App. at 627, 38 N.E.2d at 975) (Emphasis added).[4]

Similarly, in *Dueuel v. Lahman*, 103 Ill. App. 3d 220, 430 N.E.2d 662 (1981), the jury ignored its joint and several liability instructions and returned a verdict against two defendants "in the sum of $27,500 each." In accord with the law of joint and several liability, the trial court entered judgment against each defendant for $54,000. Again,

[4] For additional cases announcing the same rule, *see also, Landon v. National Building Corporation*, 415 F.2d 869 (6th Cir. 1969), holding that where jury found that defendants were 65% and 25% liable, and that 10% of liability was attributable to "other causes," district judge's distribution of the 10% of liability attributed to "other causes" between said defendants deprived defendants of their right to a jury trial; *Detroit City Gas Co. v. Syme*, 109 F.2d 366 (6th Cir. 1940), holding that where jury verdict found each of two defendants liable for $5,000 there was error in entering a judgment which subjected each of the defendants to a joint liability of $10,000, even though jury had failed to follow proper instruction that the verdict had to be returned in one lump sum, noting that "the amount found against each defendant is the very essence of the verdict and the amount awarded cannot be stricken out without destroying the verdict in its entirety."

the Illinois court disapproved this attempt to correct the jury verdict, and ordered a new trial.

3. The Instant Decision Of The Illinois Supreme Court Does Violence To Petitioners' Constitutional Rights.

The Illinois Supreme Court's affirmance of the increased verdict against Petitioners in this case flies in the face of each of the above decisions and the constitutional principles espoused therein. Petitioners were entitled to a jury trial under the Illinois Constitution. The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution entitled Petitioners to have the Illinois court system protect and enforce that right as it does for all other Illinois citizens. The jury's verdict in favor of Respondent and against Petitioners for "7% of the compensatory damages" constitutionally permitted the lower court to enter judgment for no more than $595,812.13 or order a new trial.

In short, a court is constitutionally empowered to enforce a personal injury verdict, to set it aside and order a new trial, or to order a remittitur lowering the verdict—but it cannot constitutionally increase the verdict. Nevertheless, the lower court ultimately entered a judgment against Petitioners for 10 times the amount of the jury's verdict ($5,511,759.00) and the Supreme Court of Illinois approved this increase in the jury's verdict. The constitutional violation is blatant, the result is "unconscionable," and the last chance for relief now lies with this Court.

4. If Allowed To Stand, The Illinois Supreme Court Opinion Will Serve As Precedent For Similar "Unexplained Manueverings" To Deprive A Litigant Of His Constitutional Right.

A large number of states now recognize some form of contribution. *See* Uniform Laws Annotated, Uniform Contribution Among Tortfeasors Act. If allowed to stand, the Illinois Supreme Court opinion will be a catalyst for other parties in other lawsuits across the country to engage in "unexplained manueverings" (138 Ill. 2d at 550-556) (App. 1 at pp. 16-22), similar to those engaged in here by Respondent and Sterling/Breon to frustrate the intent of the contribution doctrine, to rewrite the jury's verdict, and to do violence to the jury's intent. The end result will be more "terribly wrong" results like this one which is both "inequitable" and unconstitutional (138 Ill. 2d at 550-556) (App. 1 at pp. 16-22).[5]

[5] Justice Ryan, dissenting in the Illinois Supreme Court, expressed his "fear" that courts were being "too casual[]" in assessing the "good-faith" requirement of settlement under the Contribution Act. He noted that this was an especial concern in post-judgment settlements: "Settlement agreements should not be used as an instrument of conspiracy to "gang up on" a nonsettling defendant, thereby shifting a substantial part of the liability to one not a party to the agreement. This is particularly true where, as in this case, there has been a determination that the nonsettling defendant is much less culpable than the settling defendant and the result of the settlement shifts the major share of the damages to the less responsible defendant." (138 Ill. 2d at 552-553) (App. 1 at pp. 18-19).

CONCLUSION

Where State law guarantees a right to trial by jury, State courts are not constitutionally permitted to increase separate jury verdicts in a personal injury case, regardless of the law of joint and several liability or any principle of contribution. By increasing the jury verdict against Petitioners in this case, the Illinois Supreme Court patently violated this principle and thereby deprived Petitioners of their fundamental rights to due process and equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. Although this Court cannot hope to remedy every constitutional deprivation, the enormous amount of the liability unconstitutionally imposed on Petitioners,[6] the fundamental nature of the right to a jury trial ("the most transcendent privilege which any subject can enjoy"), and the dangerous precedent set for similar constitutional deprivations in every contribution case makes this case worthy of this Court's review. Accordingly, Petitioners respectfully request that the instant Petition for Writ of Certiorari to the Supreme Court of Illinois be granted.

Respectfully submitted,

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[6] Petitioners Umbrella carrier has paid Respondent all but $1,000,000 of the increased award. However, that carrier has now sued Petitioners seeking to get its money back.

90-1376

Supreme Court, U.S.
FILED
FEB 28 1991
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ST. JOHN'S HOSPITAL and DR. SHARI FITZGERALD,

Petitioners,

v.

ERICA HENRY, by her Mother and Next Friend, JANE HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX 1

[138 Ill.2d 533]

Erica HENRY, by her Mother and Next Friend, Jane HENRY, Appellant,

v.

ST. JOHN'S HOSPITAL et al., Appellees.

No. 68659.

Supreme Court of Illinois.

Sept. 19, 1990.

As Modified on Denial of Rehearing Nov. 30, 1990.

* * * * *

Justice STAMOS delivered the opinion of the court:

Plaintiff, Erica Henry, was severely injured during her birth as a result of the negligent administration of the drug Marcaine, an anesthetic, to her mother. Plaintiff sued defendants St. John's Hospital and Dr. Shari Fitzgerald (defendants) in a medical malpractice action. Plaintiff also sued Sterling Drug, Inc., and Breon Laboratories, Inc. (Sterling-Breon), the manufacturers of the drug, in the same action for failure to properly warn about the drug and failure to contraindicate it for the usage which allegedly caused plaintiff's injuries. During the trial, Sterling-Breon filed a contribution claim against defendants, alleging that Dr. Fitzgerald had negligently administered the drug.

The circuit court of Sangamon County found as a matter of law that defendants had violated the standard of care and directed a verdict as to that issue. On the issue of causation, the jury returned a verdict against defendants and Sterling-Breon, and assessed $10 million in compensatory damages. The jury determined that defendants' *pro*

rata share of these damages was 7%, and that Sterling-Breon was liable for 93% of the compensatory damages. (*Henry v. St. John's Hospital* (1987), 159 Ill.App.3d 725, 728, 111 Ill.Dec. 503, 512 N.E.2d 1044.) In a remittitur, the trial court reduced the medical-expenses portion of the award for compensatory damages and entered judgment against defendants and Sterling-Breon for $8,511,759. In addition, the jury returned a verdict against Sterling-Breon for $7 million in punitive damages. 180 Ill.App.3d 558, 561, 129 Ill.Dec. 537, 536 N.E.2d 221.

Plaintiff's mother, Jane Henry, brought a separate action on her own behalf against defendants and Sterling-Breon in which she alleged that their actions constituted an intentional infliction of emotional distress. After the mother's action was dismissed on the pleadings, she appealed. Defendants and Sterling-Breon appealed plaintiff's jury verdict. 180 Ill.App.3d at 562, 129 Ill.Dec. 537, 536 N.E.2d 221.

While both appeals were pending, plaintiff filed a petition for approval of minor plaintiff's settlement agreement with Sterling-Breon and for a good-faith finding pursuant to the Contribution Act (Ill.Rev.Stat.1987, ch. 70, pars. 301 through 305). The details of the settlement are included in the appellate court opinion and need not be repeated here. (See 180 Ill.App.3d at 562-63, 129 Ill.Dec. 537, 536 N.E.2d 221.) Nevertheless, this agreement between plaintiff and Sterling-Breon provided a monetary settlement of both plaintiff's and her mother's claim against Sterling-Breon, but for a total current cash value which was much less than the amount Sterling-Breon was liable to pay plaintiff on the jury's verdict. The agreement specifically stated that plaintiff and her parents intended to pursue their claims against defendants. (180 Ill. App.3d at 562, 129 Ill.Dec. 537, 536 N.E.2d 221.) The

agreement also provided for the indemnification of Sterling-Breon for any claims brought by defendants against Sterling-Breon for contribution. 180 Ill.App.3d at 563, 129 Ill.Dec. 537, 536 N.E.2d 221.

The trial court found that the settlement was in good faith, dismissed Sterling-Breon from plaintiff's action, and vacated the judgment against Sterling-Breon. (180 Ill.App. 3d at 563, 129 Ill.Dec. 537, 536 N.E.2d 221.) The appellate court then affirmed the judgment against defendants. *Henry*, 159 Ill.App.3d at 735, 111 Ill.Dec. 503, 512 N.E.2d 1044; 180 Ill.App.3d at 563-64, 129 Ill.Dec. 537, 536 N.E.2d 221.

Plaintiff then initiated post-judgment proceedings against defendants. Defendants responded by tendering a check to plaintiff for the 7% of the judgment they were liable for, plus interest, and petitioning the trial court for entry of judgment on the jury verdict. The trial court denied defendants' motion, holding that defendants were jointly and severally liable for the entire jury verdict sum. The court then held that after the settlement, the amount of recovery had been reduced by $3.35 million, making defendants liable for the remainder of the verdict—$5.51 million in compensatory damages, $1.53 million in interest accrued up to that date, and any interest after that, accruing at a rate of $1,359 per day. 180 Ill.App.3d at 564, 129 Ill.Dec. 537, 536 N.E.2d 221.

Defendants appealed this judgment. The appellate court, in reversing the trial court's ruling, looked to the language of the Contribution Act, which provides that where two or more persons are subject to tort liability to the same person for the same injury, there is a right of contribution among them. (180 Ill.App.3d at 564, 129 Ill.Dec. 537, 536 N.E.2d 221; Ill.Rev.Stat.1987, ch. 70, par. 302(a); see *Rakowski v. Lucente* (1984), 104 Ill.2d 317, 322, 84 Ill.Dec. 654,

472 N.E.2d 791; see generally M. Polelle & B. Ottley, Illinois Tort Law 671-73 (1985) (discussing the Contribution Act).) This right of contribution exists only in favor of tortfeasors who have paid more than their *pro rata* share of the common liability, and recovery is limited to the amount they have paid in excess of their *pro rata* share. Ill.Rev.Stat.1987, ch. 70, par. 302(b); see *Houser v. Witt* (1982), 111 Ill.App.3d 123, 125, 66 Ill.Dec. 799, 443 N.E.2d 725.

The appellate court focused on section 2(c) of the Contribution Act, which provides that a settlement agreement, made in good faith with one or more persons liable in tort arising out of the same injury, will not discharge any of the remaining joint tortfeasors from liability unless the agreement expressly provides for such a discharge. It further states that the settlement will reduce the amount the other tortfeasors owe by the amount stated in the settlement, or the contribution actually paid, whichever is greater. (180 Ill.App.3d at 564-65, 129 Ill.Dec. 537, 536 N.E.2d 221, citing Ill.Rev.Stat.1987, ch. 70, par. 302(c).) The appellate court also noted that the Contribution Act expressly provides that a tortfeasor who settles is discharged from all liability for contribution and is not entitled to recover from any tortfeasor who is still liable (180 Ill.App.3d at 565, 129 Ill.Dec. 537, 536 N.E.2d 221, citing Ill.Rev.Stat.1987, ch. 70, pars. 302(d), (e)), while it maintained that a plaintiff's ability to recover the full amount of the judgment from any one or more defendants subject to liability in tort for the same injury to the same person is not affected by the Contribution Act. 180 Ill. App.3d at 565, 129 Ill.Dec. 537, 536 N.E.2d 221, citing Ill.Rev.Stat.1987, ch. 70, par. 304.

In its analysis, the appellate court first stated that the function of a court in construing statutes is to ascertain

and give effect to the statute's legislative intent. (180 Ill. App.3d at 565, 129 Ill.Dec. 537, 536 N.E.2d 221, citing *Dornfeld v. Julian* (1984), 104 Ill.2d 261, 266, 84 Ill.Dec. 471, 472 N.E.2d 431.) The court then analyzed the legal precursors and legislative history of the Contribution Act, concluding that one of the main purposes of the Act was to spread the liability among joint tortfeasors in proportion to the degree each was responsible for the injured party's damages (180 Ill.App.3d at 565-67, 129 Ill.Dec. 537, 536 N.E.2d 221.) Using this as its foundation, the court interpreted the Contribution Act as providing that an injured party who has reduced liability to judgment by verdict in an amount certain and then settles with a tortfeasor who is financially able to satisfy the entire judgment, has to waive the right to enforce any portion of the judgment not corresponding to a nonsettlor's percentage of negligence against any non-settling tortfeasors, despite the Contribution Act's maintaining an injured party's right to hold all defendants jointly and severally liable. 180 Ill.App.3d at 569-70, 129 Ill.Dec. 537, 536 N.E. 2d 221.

The appellate court based much of its reasoning on *Bartels v. City of Williston* (N.D.1979), 276 N.W.2d 113. (180 Ill.App.3d at 568-69, 129 Ill.Dec. 537, 536 N.E.2d 221 (the court also relied on a similar case, *Prudential Life Insurance Co. v. Moody* (Ky.1985), 696 S.W.2d 503).) The *Bartels* court held that joint and several liability exists to benefit the injured party and can be waived by a settlement with a single joint tortfeasor, which serves to limit the injured party's recovery from any remaining tortfeasors to the percentage of negligence attributed to each. (180 Ill.App.3d at 569, 129 Ill.Dec. 537, 536 N.E.2d 221, citing *Bartels*, 276 N.W.2d at 122.) The appellate court found a direct correlation between the statutory language

cited in *Bartels* and the Contribution Act, holding that plaintiff waived joint and several liability and that recovery from defendants was limited to the 7% amount attributed to them by the jury. 180 Ill.App.3d at 569-70, 129 Ill.Dec. 537, 536 N.E.2d 221.

We disagree with the appellate court's analysis in the case at bar and therefore reverse. Despite the many issues plaintiff raises on appeal, we need only address the appellate court's incorrect interpretation of the Contribution Act. We hold that an injured party does not waive the right to enforce a judgment against a jointly and severally liable tortfeasor by settling with another joint tortfeasor.

We find that the appellate court has misapplied the basic principles of statutory interpretation in the case at bar. We agree that this court, when it interprets statutes, has a duty to determine the intent of the legislature when enacting the statute in question and to enforce that intent. (*Faheem-El v. Klincar* (1988), 123 Ill.2d 291, 297-98, 122 Ill.Dec. 809, 527 N.E.2d 307.) However, the rules of statutory construction require us to first look to the statutory language itself as the best indication of the intent of the drafters (*County of DuPage v. Graham, Anderson, Probst & White, Inc.* (1985), 109 Ill.2d 143, 151, 92 Ill.Dec. 833, 485 N.E.2d 1076; *People v. Robinson* (1982), 89 Ill.2d 469, 475, 60 Ill.Dec. 632, 433 N.E.2d 674), and where the intent can be ascertained from the statute's language, it will be given effect without resorting to other aids for construction (*Robinson*, 89 Ill.2d at 475, 60 Ill.Dec. 632, 433 N.E.2d 674). When interpreting a statute, we must give the language of the statute its plain and ordinary meaning. *Maloney v. Bower* (1986), 113 Ill.2d 473, 479, 101 Ill.Dec. 594, 498 N.E.2d 1102.

The appellate court did attempt to give the language of section 3 of the Contribution Act its plain and ordinary meaning when it endeavored to define the term "amount." (180 Ill.App.3d at 567, 129 Ill.Dec. 537, 536 N.E.2d 221.) The pertinent part of section 3 states:

> "Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute *to one seeking contribution* an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability." (Emphasis added.) Ill.Rev.Stat.1987, ch. 70, par. 303.

While the appellate court's analysis of the legislative history surrounding the Contribution Act was all correct, it is irrelevant. (See *Village of Carpentersville v. Pollution Control Board* (1990), 135 Ill.2d 463, 469-70, 142 Ill.Dec. 848, 553 N.E.2d 362.) The plain language of section 3 states that no party is required to contribute more than that party's *pro rata* share to one seeking contribution. The right of contribution contemplated by this statute exists among joint tortfeasors, not between tortfeasors and the parties they injure. (See Ill.Rev.Stat.1987, ch. 70, pars. 302(a), (b).) Section 4 of the Contribution Act expressly states that a plaintiff's right to recover the full amount of a judgment from any single defendant is not affected by the provisions of the Act. (Ill.Rev.Stat.1987, ch. 70, par. 304.) Sections 2(c) and 2(d) explain the only way a defendant can escape joint and several liability under the Act—a release, or covenant not to sue or not to enforce judgment of that tortfeasor's liability, which a plaintiff gives in good faith. However, section 2(c) further explains that the liability of the remaining tortfeasors is

reduced only to the extent of any amount stated in the release or covenant, or in the amount paid for it, whichever is greater. Ill.Rev.Stat.1987, ch. 70, pars. 302(c), (d).

Therefore, when we read these statutory sections together (see *Castaneda v. Human Rights Comm'n* (1989), 132 Ill.2d 304, 318, 138 Ill.Dec. 270, 547 N.E.2d 437 (legislative intent must be determined from entire statute, not just an isolated passage)), we find that the plain meaning of the statutory language indicates that the Contribution Act does not affect a plaintiff's common law right to collect the full amount of a judgment from any individual tortfeasor who is jointly and severally liable for that plaintiff's injuries. (But see Ill.Rev.Stat.1987, ch. 110, par. 2-1117 (altering the joint and several liability of tortfeasors who are less than 25% responsible for the injury; but statute was not in effect when injury in case at bar occurred).) If a plaintiff elects to settle with one party, the remaining tortfeasors are still jointly and severally liable for the full amount of the judgment, less the amount of the settlement. Thus, the trial court was correct in holding defendants liable for the full amount of the judgment minus the value of the Sterling-Breon settlement agreement.

We also disagree with the appellate court's characterization of the settlement agreement as acting as a waiver of plaintiff's right to the 93% of the judgment for which Sterling-Breon was liable. As we have already stated, the Contribution Act creates a right of contribution *among joint tortfeasors*. The language of the Act expressly excludes any other party. (Ill.Rev.Stat.1987, ch. 70, pars. 302(a), (b), 303 ("where 2 or more persons are subject to liability in tort arising out of the same injury * * * there is a right of contribution *among them* * * *. The right of contribution exists *only* in favor of a *tortfeasor* * * *.

* * * [N]o person shall be required to contribute *to one seeking contribution* an amount greater than his pro rata share" (emphasis added)).) Also, section 4 of the Act explicitly states that a plaintiff's right to fully recover from any one or more joint tortfeasors is not affected by the provisions of the Act. (Ill.Rev.Stat.1987, ch. 70, par. 304.) We therefore find nothing in the language of the statute to support the appellate court's finding that a plaintiff's settlement agreement with one joint tortfeasor acts as a waiver of the right to jointly and severally enforce a judgment under the Contribution Act.

We also find that the appellate court's reliance on the *Bartels* and *Moody* cases was misplaced. In *Bartels*, the court interpreted a section of North Dakota's contribution statute, which is similar to section 2(c) of our Contribution Act, as having been impliedly repealed by a subsequent comparative negligence statute which required the jury to render a separate verdict as to each defendant and apportion the damages accordingly. The *Bartels* court further stated that the provision in the comparative negligence statute, which provided that joint tortfeasors shall remain jointly and severally liable, was included for the benefit of the injured party and was waivable. *Bartels*, 276 N.W.2d at 121-22.

Bartels, however, is distinguishable from the case at bar. Illinois' comparative negligence statutes (Ill.Rev.Stat.1987, ch. 110, pars. 2-1116, 2-1117, 2-1118) were not in effect when plaintiff's injuries occurred. Therefore, no subsequent legislative action existed in this State to help us interpret the Contribution Act for the purposes of the case at bar. Also, the statutory language which the appellate court quoted from *Bartels* was from the North Dakota comparative negligence statute, not that State's contribution act. (See 180 Ill.App.3d at 569, 129 Ill.Dec.

537, 536 N.E.2d 221; *Bartels*, 276 N.W.2d at 121.) It was therefore inappropriate for the appellate court to use statutory language which nullified a statute similar to our Contribution Act in such a way as to contradict the plain meaning of our statute.

In a similar fashion, the *Moody* case concerned a statute which addressed the issue of comparative negligence, rather than contribution. Therefore, *Moody* is also distinguishable from the case at bar. *Moody*, 696 S.W.2d at 504.

Because the Contribution Act focuses on the rights of joint tortfeasors, the appellate court should have focused the waiver issue on the actions of defendants, not plaintiff. Defendants appear to have anticipated this, because they claim that any attempt on their part to pursue a contribution action against Sterling-Breon became futile when plaintiff and Sterling-Breon entered into the settlement agreement, because section 2(d) of the Contribution Act states, "The tortfeasor who settles with a claimant * * * is discharged from all liability for any contribution to any other tortfeasor." (Ill.Rev.Stat.1987, ch. 70, par. 302(d).) Defendants argue that allowing plaintiff to effectively choose the percentage of liability she will enforce in judgment makes post-judgment settlements impossible in cases with joint tortfeasors. They further claim that plaintiff's interpretation of the Contribution Act actually serves to destroy defendants' right to pay only their *pro rata* share of the judgment, because their ability to seek contribution from Sterling-Breon was nullified by the settlement and was completely out of their control. Thus, defendants impliedly argue that they cannot be held to have waived the right to pay only their *pro rata* share.

Defendants, however, mischaracterize their rights under the Contribution Act. Defendants do not have a right to

have their liability limited to their *pro rata* share of the judgment. Rather, section 2(b) of the Act gives them a right of contribution if they pay more than their *pro rata* share of the common liability. Section 2(b) also states that no tortfeasor is liable to *make contribution* for more than his *pro rata* share. (Ill.Rev.Stat.1987, ch. 70, par. 302(b).) Thus, defendants have only a right to recoup from the other joint tortfeasors any amount they pay to plaintiff in excess of their own *pro rata* share.

However, defendants have waived any right of contribution. When there is a pending action in a personal injury case involving joint tortfeasors, the contribution claim should be asserted by counterclaim or by third-party claim in that action, or else the contribution claim is barred. (*Laue v. Leifheit* (1984), 105 Ill.2d 191, 195-97, 85 Ill.Dec. 340, 473 N.E.2d 939.) The *Laue* court designed this rule to prevent separate juries from deciding the separate issues of liability to the plaintiff and the percentages of liability among the defendants—thus avoiding a multiplicity of lawsuits and the possibility of inconsistent verdicts. Even though the question of defendants' right to contribution is being raised on appeal, rather than in a separate trial proceeding, we find the waiver principle equally applicable.

The *Laue* court's construction of section 5 of the Contribution Act leads us to conclude that anytime a joint tortfeasor fails to bring his contribution claim in the original action, any claim to contribution is thereafter a nullity. Section 5 states:

> "Enforcement. A cause of action for contribution among joint tortfeasors may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action." (Ill. Rev.Stat.1987, ch. 70, par. 305.)

The *Laue* court interpreted the language of section 5 which provides that a contribution claim may be asserted by a "separate action before or after payment" as covering situations where the injured party has not initiated a pending lawsuit. However, where there is a pending action, the contribution claim must be asserted in that action. (*Laue*, 105 Ill.2d at 196, 85 Ill.Dec. 340, 473 N.E.2d 939.) Therefore, the plain meaning of section 5's language mandates that, unless a joint tortfeasor brings a counterclaim or third-party claim for contribution in the original action, any claim for relief under the Contribution Act is thereafter waived. Though the case at bar is factually distinguishable from *Laue*, we find no reason to depart from that decision's express holding.

Also, we must note that the appellate court has already settled this issue. The first time this cause came before the appellate court, that court held that the trial court was correct in not allowing defendants to file a contribution counterclaim. The trial court determined that defendants had requested leave to file the counterclaim, which amounted to an amendment of the pleadings, at such a late stage of the trial that to allow defendants' request would have prejudiced the other parties. It further noted that the counterclaim also amounted to defendants' raising a new issue after all parties had rested their cases. The appellate court expressly held that the counterclaim had not been raised in a timely fashion. (*Henry*, 159 Ill.App.3d at 734, 111 Ill.Dec. 503, 512 N.E.2d 1044.) This serves only to support our holding that by failing to preserve their contribution rights in the original action, defendants have effectively waived those rights.

Defendants further argue, against the requirement that they must file a contribution claim in the original action

in order to preserve their right to pay no more than their *pro rata* share of the judgment, that the trial court's finding that the settlement agreement was in good faith was erroneous. Specifically, defendants claim that this ruling effectively bars them from seeking contribution and only serves to allow plaintiff and Sterling-Breon to "gang up on" defendants, who were not parties to the settlement agreement.

Section 2(d) of the Contribution Act indeed does provide that a joint tortfeasor who settles will escape liability for contribution. (Ill.Rev.Stat.1987, ch. 70, par. 302(d).) We need not decide, however, whether a settlement between a joint tortfeasor and a plaintiff, entered into after a jury has determined the amount of each joint tortfeasor's *pro rata* share of the judgment amount, which settlement results in one joint tortfeasor's paying substantially less than its *pro rata* share while cutting off that tortfeasor's contribution liability to the remaining joint tortfeasors, is a good-faith settlement under the Contribution Act. This is because a section 2(d) discharge of contribution liability cannot occur where the settling joint tortfeasor not only has no contribution liability before he entered into the settlement agreement but, because of the nonsettling tortfeasors' failure to preserve their contribution claim, can have no such liability thereafter.

As we have already explained, defendants in the case at bar failed to preserve their right to contribution from Sterling-Breon, because they neglected to raise the contribution claim in a timely fashion during the original proceeding. The doctrine of contribution among joint tortfeasors is equitable in origin (see *Skinner v. Reed-Prentice Division Package Machinery Co.* (1977), 70 Ill.2d 1, 12-13, 15 Ill.Dec. 829, 374 N.E.2d 437; 18 Am.Jur.2d *Contribution* §§ 3 through 5 (1985)), and "equity aids the vigilant

and not those who sleep on their rights" (*Bell v. Louisville & Nashville R.R. Co.* (1985), 106 Ill.2d 135, 146, 88 Ill.Dec. 69, 478 N.E.2d 384, citing *Flannery v. Flannery* (1943), 320 Ill.App. 421, 432, 51 N.E.2d 349). Defendants had ample opportunity to alert the trial court to their interests by filing a contribution claim at some point during the original trial. This means that, at the time the trial judge approved the settlement agreement, Sterling-Breon could not possibly have been liable to defendants for contribution; the right had been waived. Technically, Sterling-Breon had no contribution liability to be discharged at the time the "good-faith" determination was made. The trial court's finding that the settlement agreement was in good faith, therefore, could not possibly be a bar to defendants' contribution claim against Sterling-Breon. *Cf.* Ill.Rev.Stat.1987, ch. 110, par. 2-1117 (tortfeasors who are less than 25% responsible are only severally liable for damages arising from negligently inflicted bodily injury; statute not in effect at time of plaintiff's injury).

Defendants also characterize the trial court's holding them liable for the entire remainder of the judgment sum, rather than for 7% of the damages as the jury determined, as an improper post-judgment reallocation of the jury verdict. Defendants rely on this court's decision in *Kerns v. Engelke* (1979), 76 Ill.2d 154, 167-70, 28 Ill.Dec. 500, 390 N.E.2d 859. In *Kerns*, one of three joint tortfeasors entered into a post-judgment loan receipt agreement with the plaintiff. This agreement provided for the tortfeasor to lend money to the plaintiff for the purpose of financing the plaintiff's appeal. This loan was to be paid back from any money recovered from the remaining joint tortfeasors. The *Kerns* court held this agreement void as an improper assignment of a personal injury judgment to a party who is liable for the injury. The *Kerns* court

stated that this type of loan receipt agreement was proper only if made before the liability of the multiple tortfeasors is adjudicated. Defendants see a direct correlation between the type of post-judgment manipulation in *Kerns* and the post-judgment agreement entered into here.

We disagree. The type of loan agreement that existed in *Kerns* was a remnant left from the time when contribution among joint tortfeasors was prohibited at common law. In effect, these loan agreements allowed plaintiffs to apportion liability among the joint tortfeasors, despite the ban on contribution. However, at that time this court would only uphold as valid those loan receipt agreements which were entered into before liability was adjudicated. This was done to allow the joint tortfeasors to use the agreement for impeachment purposes at trial. (See *Kerns*, 76 Ill.2d at 168-70, 28 Ill.Dec. 500, 390 N.E.2d 859, see also *Skinner*, 70 Ill.2d at 12, 15 Ill.Dec. 829, 374 N.E.2d 437.) The *Kerns* court also held that a post-judgment loan receipt agreement allows a joint tortfeasor to avoid the bar to contribution or indemnification when not entitled to it. *Kerns*, 76 Ill.2d at 171, 28 Ill.Dec. 500, 390 N.E.2d 859.

Thus, *Kerns* is wholly inapplicable to the case at bar. The rights which the *Kerns* court sought to protect are no longer an issue because our decision in *Skinner*, codified by the Contribution Act, now allows for a right of contribution among joint tortfeasors. (See M. Polelle & B. Ottley, Illinois Tort Law 671-73 (1985).) That is, provided joint tortfeasors employ the machinery of the Contribution Act, they can prevent the type of inequities which the *Kerns* court decried. As we have explained already, however, defendants have failed to follow the procedures of the Act. Therefore, defendants' use of *Kerns* to argue issues related to contribution is akin to the use of an overturned case to support their position.

Accordingly, we hold that plaintiff did not waive her right to enforce judgment against defendants by settling with another joint tortfeasor, and therefore reverse the judgment of the appellate court. We affirm the judgment of the circuit court of Sangamon County and hold that defendants, by failing to file a claim for contribution during the trial, waived their right to contribution from the other joint tortfeasors, and, under the express terms of the Contribution Act, are jointly and severally liable for the entire amount of the judgment, less the amount which Sterling-Breon paid plaintiff in settlement.

Appellate court reversed; circuit court affirmed.

Justice RYAN, dissenting:

There is something terribly wrong with the construction we have placed on the law in relation to contribution, which permits the enhancement of the obligation of defendants St. John's Hospital and Dr. Fitzgerald (St. John's-Fitzgerald) to the plaintiff from $715,559.07 to $5,511,759 through the unexplained maneuvering between plaintiff and the drug company defendants. I must, therefore, dissent.

The jury found that defendants St. John's Hospital and Dr. Fitzgerald's *pro rata* share of plaintiff's compensatory damages was 7%, which, with interest to the date of tender, amounted to $715,559.07. However, because of plaintiff's settlement with the drug company defendants, whose *pro rata* shares of the compensatory damages, as found by the jury, totaled 93%, for substantially less than that amount, defendants St. John's Hospital and Dr. Fitzgerald have now had judgment entered against them for $5,511,759, plus interest. Also, because the trial court found the settlement to be in good faith under our Contribution Act, as noted in the majority opinion, defendants

St. John's Hospital and Dr. Fitzgerald's contribution rights against the defendants who had settled have been terminated.

Addressing first the question of the good faith of the settlement between the plaintiff and the drug companies, I cannot understand why plaintiffs would settle a claim against the drug company defendants, whose 93% *pro rata* share of the verdict was nearly $8 million, for roughly $3,350,000. As noted later, however, an examination of the structured settlement may shed some light on this. There is no indication that the drug companies were insolvent or that there was any reason that the full 93% of the verdict, or indeed the entire verdict, could not have been collected from the drug companies.

It appears that the settlement was entered into while the case was pending on the first appeal, that is, the appeal from the original verdict. That appeal is reported in 159 Ill.App.3d 725, 111 Ill.Dec. 503, 512 N.E.2d 1044. It was noted in the appellate court's opinion in the second appeal (180 Ill.App.3d 558, 129 Ill.Dec. 537, 536 N.E.2d 221) that St. John's-Fitzgerald filed objections to the settlement. There is also noted in the second appeal that the trial court found that the settlement was in good faith and that St. John's-Fitzgerald attempted to appeal from the good-faith finding and the dismissal of plaintiff's action pursuant to the agreement. The appellate court dismissed that appeal as not being based on a final order. The appellate court stated, in the second appeal, that St. John's-Fitzgerald argued, in that appeal, that "the settlement, if it allows for a post-judgment shifting of responsibilities, is not in good faith." (180 Ill.App.3d at 564, 129 Ill. Dec. 537, 536 N.E.2d 221.) This history is set forth in the appellate court's opinion in the second appeal. (180 Ill.App. 3d at 562-64, 129 Ill.Dec. 537, 536 N.E.2d 221.) Thus, St. John's-Fitzgerald objected to the settlement. The trial

court ruled that the settlement was in good faith and an appeal was taken from that order. The appeal was dismissed as not being based on a final order. The trial court then entered judgment against St. John's-Fitzgerald based on the settlement agreement and the second appeal was taken, in which the good-faith question was raised. The case is before us on the allowance of the petition for leave to appeal from the appellate court's holding in the second appeal. (It should be noted that the appeal from the good-faith finding of the trial court which was dismissed came between what are referred to herein as the first and second appeals.)

In my opinion, an agreement which permits an unconscionable, unexplained shifting of liability from the defendants who have been found 93% responsible to the defendants who were found to be only 7% responsible, and which cuts off the right of contribution of the less responsible defendants from the more responsible defendants, is not a good-faith settlement.

I fear that trial courts and the appellate court have too casually assessed the good-faith requirement of settlements between plaintiffs and one or more of several defendants. In determining the good faith of a settlement, the interests of all of the parties affected by such a settlement should be considered, not just the interests or preferences of the parties to the agreement. Settlement agreements should not be used as an instrument of conspiracy to "gang up on" a nonsettling defendant, thereby shifting a substantial part of the liability to one not a party to the agreement. This is particularly true where, as in this case, there has been a determination that the nonsettling defendant is much less culpable than the settling defendant and the result of the settlement shifts the major share of the damages to the less responsible defen-

dant. In such a situation as we have in this case, there should be a showing of a valid reason for such a disparate settlement which brings about such an inequitable result.

I acknowledge that section 4 of the Contribution Act (Ill.Rev.Stat.1987, ch. 70, par. 304) makes each defendant, regardless of the finding as to its *pro rata* share of responsibility, severally liable for the entire verdict. That is all the more reason that courts should carefully protect the right of contribution of the one who is forced to pay more than its share of the damages. The purpose of contribution is to place the responsibility on the defendant who has caused the damages, so that each tortfeasor pays its *pro rata* share based on its culpability. The reason for adopting contribution is to permit those who are compelled to pay more then their share to recover from those who have not paid their share. The net result of the majority's construction of the Contribution Act and prior decisions of this court defeats the very purpose which the adoption of contribution in this State sought to accomplish. The reason for adopting contribution can easily be defeated by the loose and casual handling of settlement agreements by our courts. The majority's handling of contribution has resulted in just as inequitable a situation as that which existed before the adoption of the principle of contribution among joint tortfeasors.

The majority relies upon *Laue v. Leifheit* (1984), 105 Ill. 2d 191, 85 Ill.Dec. 340, 473 N.E.2d 939, in holding that St. John's-Fitzgerald waived any right to contribution by not filing a counterclaim for contribution in the original action. I do not agree with the majority's conclusion. I also do not agree with this court's holding in *Laue* and filed a dissenting opinion in that case. However, I must accept *Laue* as the law of this State until it is overruled, but the facts of this case differ from those in *Laue* and

I would not extend the holding in *Laue* to the facts of this case. *Laue* involved an automobile accident in which Leifheit and her passengers were injured. Leifheit and her passengers sued Laue and the jury returned verdicts in favor of the plaintiffs, but as to Leifheit, the jury found that she was 33⅓% negligent for comparative negligence purposes. Laue then brought a separate suit against Leifheit for contribution for 33⅓% of the damages he had paid to the other passengers in Leifheit's vehicle.

In our case the facts are different. Here, all parties against whom damages are sought are parties-defendants in this case, and the jury made the determination as to the percentage of damages each defendant should pay by way of contribution. That was not the case in *Laue*. There, Leifheit had not been a defendant as to the claims of the passengers in her car. No damages had been assessed against her and there had been no determination that as to the claims of her passengers she was in any way responsible. The question sought to be litigated in *Laue* was whether Leifheit was responsible for any of her passengers' injuries and, if so, what was the percentage of her responsibility for contribution purposes. Those facts have already been determined in our case. All that St. John's-Fitzgerald is trying to do is to collect from the drug company defendants the amount of the judgment over and above the 7% for which the jury found St. John's-Fitzgerald responsible. I would not extend the holding in *Laue* to these facts.

Also, the fact that St. John's-Fitzgerald did not timely file a counterclaim for contribution against the drug company defendants is of no significance. The drug company defendants had filed a counterclaim against St. John's-Fitzgerald. It was therefore necessary for the jury to determine the *pro rata* culpability of all of the defendants in

the same manner as if St. John's-Fitzgerald had filed a counterclaim for contribution against the drug company defendants. The relative culpability of all defendants was litigated and determined by the jury in the same manner as it would have been had the trial court permitted St. John's-Fitzgerald to file a counterclaim for contribution when it was tendered at the close of the evidence. Thus, there is no reason to apply the holding in *Laue* to the facts of this case.

The appellate court attempted to fashion the remedy of "waiver" to give St. John's-Fitzgerald relief from the inequities that have arisen by the application of *Laue* and the finding of good faith as to the settlement agreement. I fear that a finding that plaintiff has waived her claim against St. John's-Fitzgerald for any amount in excess of 7% of the compensatory damages may result in the plaintiff's, or at least some plaintiff in a future case to which the waiver doctrine is applied, recovering less than the verdict. I would prefer to hold, as indicated above, that the settlement was not in good faith and that the holding of *Laue* does not prevent the filing of a contribution action, and remand this case to the trial court to entertain the contribution claim of St. John's-Fitzgerald, which defendants attempted to file at the close of the evidence.

I stated above that the structured settlement may shed some light on the reason for plaintiff's willingness to settle with the drug company defendants for what appears to be substantially less than those defendants' share of compensatory damages. The plaintiff's brief, in this court, hints that the drug company defendants used the established law as "negotiating leverage" as a means of getting revenge against St. John's-Fitzgerald because of certain animosity among the defendants that developed during the trial. Plaintiff insists, in her brief, that she "did not work

this settlement," but that a codefendant "who took advantage of their partner in tort" was responsible for the settlement. Plaintiff insists she was merely a stakeholder with no interest in who paid.

The structured settlement computation sheet contained in the brief reflects a guaranteed payout of $7,908,084, very close to the amount of the drug company defendants' 93% share of the compensatory damages. The payout over the plaintiff's life expectancy is shown to be $44,361,056. The cost is shown to be $3 million. By use of the structured settlement, plaintiff is assured of receiving from the drug company defendants those defendants' *pro rata* share of the compensatory damages. The life expectancy payout will far exceed both the compensatory and punitive damages awarded by the jury. Since the settlement only cost $3 million by virtue of the several liability aspect of our contribution law, plaintiff can collect over $5 million more from the other defendants, thereby, in effect, enhancing plaintiff's recovery about $5 million above that awarded by the jury. In view of the effect of the structured settlement, I cannot accept plaintiff's protestations of innocence or the assertion that the settlement was all the drug company defendants' idea.

For the reasons stated herein, I dissent from the holding of the majority.

APPENDIX 2

[180 Ill. App. 3d 558]

ERICA HENRY, by her Mother and Next Friend, Jane Henry, Plaintiff-Appellee, v. ST. JOHN'S HOSPITAL *et al.*, Defendants (St. John's Hospital *et al.*, Defendants-Appellants).

Fourth District No. 4-88-0491

Reversed and remanded.

Opinion filed March 17, 1989.—
Rehearing denied April 13, 1989.

* * * * *

Appeal from the Circuit Court of Sangamon County; the Hon. Richard J. Cadagin, Judge, presiding.

* * * * *

PRESIDING JUSTICE McCULLOUGH delivered the opinion of the court:

St. John's Hospital and Dr. Shari Fitzgerald (St. John's-Fitzgerald) appeal a trial court order finding them liable to plaintiff for $5,511,759, plus interest. This amount is the balance of a compensatory damages award resulting from a combined medical malpractice, products liability action brought by plaintiff, who settled after judgment with one group of defendants.

St. John's-Fitzgerald argues: (1) the trial court's ruling is contrary to the jury verdict in the personal injury action; (2) the ruling is contrary to the purposes of "An Act in relation to contribution among joint tortfeasors" (Contribution Act) (Ill. Rev. Stat. 1987, ch. 70, par. 301 *et seq.*); (3) plaintiff waived her right to joint and several liability by settling with Sterling Drug, Inc., and Breon Laboratories, Inc. (Sterling-Breon); (4) judicial estoppel precludes

plaintiff from recovering the portion of the judgment attributable to Sterling-Breon from St. John's-Fitzgerald; and (5) the trial court erred in fixing the amount of post-judgment interest and determining setoff.

We reverse and remand.

Plaintiff was severely injured during birth as the result of the administration of Marcaine, an anesthetic, to her mother. Plaintiff sued St. John's-Fitzgerald alleging Fitzgerald negligently administered the drug without proper authority. She also sued Sterling-Breon for failure to properly warn about the drug and alleging a failure to contraindicate it for use in paracervical blocks prior to the time of plaintiff's injury. Sterling-Breon filed a contribution claim against St. John's-Fitzgerald, in which they alleged Fitzgerald was negligent in administering the drug. The jury returned a verdict against all defendants and assessed their *pro rata* share of the compensatory damages. It found Sterling-Breon had a 93% *pro rata* share of plaintiff's damages and St. John's-Fitzgerald a 7% share. It assessed a total of $10 million in compensatory damages, $1.5 million of which was for medical expenses. The verdict form stated:

> "We, the jury, find for the plaintiff and against the following defendants and determine their *pro rata* share of compensatory damages in the following amounts:
>
> | | | |
> |---|---|---|
> | /x/ | Sterling Drug, Inc. | 46.5% |
> | /x/ | Breon Laboratories, Inc. | 46.5% |
> | /x/ | St. John's Hospital/ Dr. Shari Fitzgerald | 7 % |
> | | TOTAL | 100 % |
>
> ***
>
> | | |
> |---|---|
> | Disability | $6,000,000.00 |
> | Disfigurement | $1,000,000.00 |
> | Pain and Suffering | $1,500,000.00 |
> | Medical Expenses | $1,500,000.00" |

The jury was told to put an "x" in the box beside the name of the defendant it found liable. Subsequently, the trial court reduced the award for medical expenses to $11,759 and entered judgment against all defendants for $8,511,759. The jury also returned a verdict finding Sterling-Breon liable for $7 million in punitive damages.

Plaintiff's mother, Jane Henry, brought an individual action against all defendants, in which she alleged their actions constituted an intentional infliction of emotional distress. Jane Henry's action was dismissed on the pleadings. St. John's-Fitzgerald and Sterling-Breon appealed the jury verdict for plaintiff. Jane Henry appealed the dismissal of her individual action.

On May 19, 1987, while the appeals were pending, plaintiff filed a petition for approval of minor's settlement and for a good-faith finding pursuant to the Contribution Act. The settlement stated:

> "1. In consideration of the payment as described and provided for in paragraphs 5(b) and 5(c) hereof, the sufficiency of which is hereby acknowledged, and other good and valuable consideration, the undersigned *** hereby unconditionally release, acquit and forever discharge Breon Laboratories Inc. and Sterling Drug Inc. *** of and from any and all obligations, claims, debts, demands, covenants, contracts, promises, agreements, liabilities, controversies, costs, expenses, interest, attorneys' fees, actions or causes of actions *** including but not limited to the claims and matters set forth in the action entitled ERICA HENRY, by her mother and next friend, JANE HENRY V. ST. JOHN'S HOSPITAL, BREON LABORATORIES, INC., DR. THOMAS O'HERN, STERLING DRUG, INC., AND DR. SHARI FITZGERALD, No. 83-L-395, in the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois (Judge Richard J. Cadigan presiding) ('pending action')."

Paragraph 2 provided for the release of Jane Henry's action for $350,000. Paragraph 3 of the release provided that simultaneously with and as "material consideration for the execution of this Agreement" and as a condition precedent to the payment of obligations by Sterling-Breon, counsel for plaintiff, plaintiff's mother, and Sterling-Breon would execute and file a stipulation dismissing the pending action with prejudice and vacating the judgment outstanding against Sterling-Breon.

Paragraph 5 of the agreement stated that in consideration for the release, Sterling-Breon would make a cash payment to Jane Henry and Thomas Henry in settlement of Jane's individual action. Further, a payment of $1.4 million in cash would be made to plaintiff's guardian. In addition, Sterling-Breon agreed to purchase an annuity from an insurance company for $1.6 million. The agreement specifically stated plaintiff and her parents intended to pursue their claim against St. John's-Fitzgerald. Plaintiff and her parents agreed to indemnify Sterling-Breon from any claims brought by St. John's-Fitzgerald on any theory including contribution. The agreement further provided that if plaintiff or her parents succeeded in recovering any monies from St. John's-Fitzgerald, the money would be placed in an escrow account until St. John's-Fitzgerald had exhausted all attempts to recover any amount from Sterling-Breon. If St. John's-Fitzgerald received a judgment against Sterling-Breon, the escrow account would be applied to the obligation.

St. John's-Fitzgerald filed objections to the settlement. However, on May 27, 1987, the trial court found the settlement was in good faith. St. John's-Fitzgerald filed a notice of appeal from the good-faith finding and dismissal of plaintiff's action against Sterling-Breon. This court dismissed St. John's-Fitzgerald's appeal as not based upon

a final appeal. On July 8, 1987, this court dismissed Sterling-Breon's original appeal. On July 13, 1987, the trial court dismissed Sterling-Breon from plaintiff's action and vacated the judgment against them. The trial court entered the following order:

> "The Court having been advised by counsel for plaintiffs and for defendants Breon-Laboratories Inc. and Sterling Drug Inc. that this action has been settled as between the aforesaid parties and this Court having reviewed the terms and condition of the Release and Settlement Agreement and the stipulation of dismissal:
>
> It is, therefore, ordered that the within action be and the same hereby is dismissed as against defendants Breon Laboratories Inc., Sterling Drug Inc. and other divisions, subsidiaries and affiliates thereof with prejudice and on the merits and the judgment entered in this action against Breon Laboratories and Sterling Drug Inc. be and the same hereby is vacated."

Plaintiff stipulated to the dismissal of Sterling-Breon from the lawsuit and the vacation of the judgment against them. They stated:

> "It is hereby stipulated and agreed by and between the undersigned counsel for Breon Laboratories Inc. and Sterling Drug Inc., and for Jane Henry, individually and on behalf of Erica Henry, that Breon Laboratories Inc. and Sterling Drug Inc. and all other divisions, subsidiaries and affiliates thereof are hereby dismissed from the above-captioned lawsuit with prejudice and on the merits. It is further hereby stipulated and agreed that the judgment against Sterling Drug Inc. and Breon Laboratories Inc. shall be vacated by order of the Court in the form annexed hereto."

In *Henry v. St. John's Hospital* (1987), 159 Ill. App. 3d 725, 512 N.E.2d 1044, this court affirmed the jury's findings as to St. John's-Fitzgerald.

On March 11, 1988, plaintiff filed a citation to discover St. John's Hospital's assets. On April 4, 1988, St. John's-Fitzgerald tendered a check for $715,559.09 to plaintiff. This represented the 7% amount plus interest to that date. On May 6, 1988, St. John's-Fitzgerald filed a petition for entry of judgment on the jury verdict. Plaintiff objected.

After a hearing, on July 8, 1988, the trial court denied St. John's-Fitzgerald's motion, and found they were jointly and severally liable for the verdict as of January 21, 1986. The court stated interest accrued as of that date. The court further found that after the settlement, the amount of recovery was reduced by $3,350,000. St. John's-Fitzgerald was liable to plaintiff for $5,511,759 plus interest accrued to May 29, 1988 ($1,528,743), and accruing thereafter at a rate of $1,359 per day. The court stated the amount given to Jane Henry for settlement of her individual claim was not a setoff against the amount of the judgment due on plaintiff's claim.

In the instant case, St. John's-Fitzgerald initially argues the imposition of the balance of the compensatory damage award against it is contrary to the jury verdict, contrary to the language of this court, contrary to the equitable principles behind the Contribution Act, and in effect, allows plaintiff to change the jury's assessment of relative degrees of fault. St. John's-Fitzgerald next argues that the settlement, if it allows for a post-judgment shifting of responsibilities, is not in good faith.

Plaintiff contends St. John's-Fitzgerald is, in essence, contesting joint and several liability, which has been upheld in courts in Illinois. Plaintiff argues that St. John's-Fitzgerald's remedy should have been a timely contribution claim against Sterling-Breon. Secondly, plaintiff con-

tends St. John's-Fitzgerald cannot contest good faith at this time.

Section 2(a) of the Contribution Act provides that where two or more persons are subject to liability in tort to the same person arising out of the same injury, there is a right of contribution among them. (Ill. Rev. Stat. 1987, ch. 70, par. 302(a).) Section 2(b) of the Contribution Act states contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability. The tortfeasor's total recovery is limited by the amount he pays in excess of his share. Ill. Rev. Stat. 1987, ch. 70, par. 302(b).

Section 2(c) of the Contribution Act states:

> 'When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater." (Ill. Rev. Stat. 1987, ch. 70, par. 302(c).)

The Contribution Act further provides that a tortfeasor who settles pursuant to section 2(c) is discharged from all liability for contribution and precluded from seeking contribution from a nonsettling tortfeasor. (Ill. Rev. Stat. 1987, ch. 70, pars. 302(d), (e).) Section 4 of the Contribution Act states:

> "Rights of Plaintiff Unaffected. A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act." Ill. Rev. Stat. 1987, ch. 70, par. 304.

The function of the court in construing statutes is to ascertain and give effect to the intention of the legislature in enacting the statute. (*Dornfeld v. Julian* (1984), 104 Ill. 2d 261, 266, 472 N.E.2d 431, 432.) In ascertaining intent, the court will look at the entire statute. It will not interpret the statute in a fashion which would render portions of it void. The court presumes the General Assembly did not intend absurdity, injustice, or inconvenience. (*Harris v. Manor Healthcare Corp.* (1986), 111 Ill. 2d 350, 489 N.E.2d 1374.) The language of a statute will be given its ordinary meaning.

The Contribution Act has two major purposes. It encourages settlements and it provides for contribution among joint tortfeasors. (*Lowe v. Norfolk & Western Ry. Co.* (1984), 124 Ill. App. 3d 80, 463 N.E.2d 792.) The Contribution Act codifies and expands principles first stated in *Skinner v. Reed-Prentice Division Package Machinery Co.* (1978), 70 Ill. 2d 1, 13, 374 N.E.2d 437, 442. The *Skinner* court stated that it saw no valid reason for the continuation of a rule prohibiting contribution among joint tortfeasors. It noted with approval statements by Dean Prosser in which he stated there was an obvious lack of justice in a rule which permits the entire burden of a loss to be shouldered by one tortfeasor based upon plaintiff's whim, spite, or collusion or a successfuly levy of execution. *Skinner*, 70 Ill. 2d at 13, 374 N.E.2d at 442, citing W. Prosser, Torts §50, at 307 (4th ed. 1971).

The purpose of the Contribution Act in eliminating inequity between joint tortfeasors is further established by the legislative history of the Act. Senator Berman in discussing the statute noted its purpose was to bring equity to an otherwise inequitable situation. It allowed everyone to participate according to their fault in any accident. (81st Ill. Gen. Assem., Senate Proceedings, May 14, 1979, at 175-

76 (statements of Senator Berman) (Senate Bill 308).) Representative Daniels stated the bill allowed for contribution of monetary damages by people that are responsible for a negligent action. Those people would normally be joined in the lawsuit; however, Daniels noted that under the current law when a judgment was rendered it was rendered against all of them and not spread out in exact and precise amounts. Daniels stated:

> "What this Bill does is allow for the contribution between responsible parties as to varying degrees of the judgment action or how much they may owe. It's a codification of the Skinner versus Reed decision out of the Illinois Supreme Court, and it adds other provisions which we think will make it more beneficial for current law." 81st Ill. Gen. Assem., House Proceedings, June 14, 1979, at 18 (statements of Representative Daniels) (Senate Bill 308).

At common law, all joint tortfeasors were jointly and severally liable for the whole of plaintiff's damages. Plaintiff could elect who he would recover from. (*Coney v. J.L.G. Industries, Inc.* (1983), 97 Ill. 2d 104, 454 N.E.2d 197.) A release of one joint tortfeasor at common law released all joint tortfeasors. (See generally *Clear-Vu Packaging, Inc. v. National Union Fire Insurance Co.* (1982), 105 Ill. App. 3d 671, 434 N.E.2d 365.) The rationale behind the rule was that only one recovery could be had for a single injury. See *Clear-Vu*, 105 Ill. App. 3d 671, 434 N.E.2d 365, citing *Manthei v. Heimerdinger* (1947), 332 Ill. App. 335, 75 N.E.2d 132.

In *Alsup v. Firestone Tire & Rubber Co.* (1984), 101 Ill. 2d 196, 200-01, 461 N.E.2d 361, 363-64, the court stated that one of the purposes behind the Contribution Act was to eliminate the rule that the release of one joint tortfeasor released all. The court noted that it believed the legislature intended that a release pursuant to section 2(c)

of the Contribution Act would not discharge joint tortfeasors from liability to the plaintiff unless they were specifically named in the release. Implicit in the *Alsup* court's analysis of section 2(c) of the Contribution Act is that a plaintiff's settlement affects his rights to recover damages from the nonsettling tortfeasors.

The Contribution Act also distributes the loss among the joint tortfeasors for plaintiff's injury. As a predicate to application of the Contribution Act, the defendants must be jointly liable to the plaintiff for the same injury. (Ill. Rev. Stat. 1987, ch. 70, par. 302(a).) The Contribution Act states that the plaintiff's right to recover the full amount of his judgment from any one or more of the defendants subject to liability in tort is not affected by the Act. Ill. Rev. Stat. 1987, ch. 70, par. 304.

In *Coney*, the court held that the doctrine of joint and several liability for a plaintiff's injury was not eliminated by the adoption of comparative negligence. The court noted the language of section 4 of the Contribution Act and the language of section 3 of the Contribution Act as support for its view that the legislature intended to retain joint and several liability. Joint and several liability for many injuries has been eliminated by statute in Illinois. (Ill. Rev. Stat. 1987, ch. 110, par. 2-1117.) The effect of this statutory change on the Contribution Act has not been litigated. The statutory changes, however, occurred after accrual of the instant case and, therefore, would not be relevant to this appeal.

We have found no Illinois cases addressing post-judgment settlements pursuant to the Contribution Act. In the instant case, plaintiff settled her compensatory damages claim against Sterling-Breon after judgment. The value of the compensatory damages claim against Sterling-Breon

was 93% of the $8,511,497 award at the time of the settlement. Additionally, a punitive damages award was vacated. Since the release provided that the entire liability of Sterling-Breon was extinguished and referenced a specific cause number in which liability was fixed by judgment, plaintiff's recovery should be reduced by the full proportional liability of Sterling-Breon.

"Amount" is defined as "[t]he whole effect, substance, import, result, or significance. The sum of principal and interest." (Black's Law Dictionary 76 (5th ed. 1979).) It is logical that an amount can be stated numerically or by the use of terms such as "all liability," "entire claim," "all claim," and "partial liability." A "claim" is defined as a cause of action, demand for money, payment, or right to payment, whether or not liquidated or reduced to judgment. Black's Law Dictionary 224 (5th ed. 1979).

We agree that the comparative negligence concepts and the Contribution Act do not affect a plaintiff's "right" to hold defendants jointly and severally liable for his injuries. However, after a plaintiff has reduced liability to judgment by jury verdict to an amount certain and elects to settle with a tortfeasor who is financially capable of satisfying the entire judgment, he waives his right to enforce that portion of the judgment against the nonsettling tortfeasor.

Interpreting the release in the instant case to reduce the plaintiff's recovery by the damages already assessed against Sterling-Breon in the trial action comports with the purpose of the Contribution Act. The dollar amount of the released claim is established here and the release specifically includes a release of any claim under the cause of action establishing the judgment amount. If the amount of the claim were not readily determinable, as in a pre-

judgment settlement, the dollar amount stated in the release would control.

In *Coney*, the court held comparative negligence did not require abandonent of joint and several liability, especially where a nonnegligent plaintiff is involved. The court noted protection of plaintiffs as a primary reason for retaining the doctrine after abrogation of the doctrine of contributory negligence. It stated one indivisible injury was involved, and as between an innocent plaintiff and a negligent but insolvent joint tortfeasor, abandonment of joint and several liability would force plaintiff to bear the loss. The court was concerned that elimination of joint and several liability would seriously impair and injure plaintiff's ability to recover adequate compensation for his injuries. (*Coney*, 97 Ill. 2d at 121-22, 454 N.E.2d at 205.) The effect of *Coney*, has been partially overruled by section 2-1118 of the Illinois Code of Civil Procedure, which provides for joint and several liability in cases where a defendant's negligence is 25% or less than that assessed to the other parties including the plaintiff. Ill. Rev. Stat. 1987, ch. 110, par. 2-1118.

Section 4 of the Contribution Act specifically states a plaintiff's "rights" to recover the full amount of his judgment from one or more of the defendants is not affected by the provisions of the Contribution Act. (Ill. Rev. Stat. 1987, ch. 70, par. 304.) Several States retain joint and several liability, some have legislatively restructured or eliminated it, and some have judicially eliminated the doctrine. See *Walt Disney World Co. v. Wood* (Fla. 1987), 515 So. 2d 198, for a discussion of the treatment of joint and several liability by the various States.

Few States have addressed a situation similar to that presented in the instant case. Among those that have,

however, one State has held that apportionment of judgment applies to limit the judgment when there is an active assertion of a claim against a joint tortfeasor. (*Prudential Life Insurance Co. v. Moody* (Ky. 1985), 696 S.W.2d 503.) In *Bartels v. City of Williston* (N.D. 1979), 276 N.W.2d 113, the court held that Bartels, who settled with a joint tortfeasor and released him waived his right to hold the remaining defendants jointly and severally liable for the entire amount of the award. The *Bartels* court analyzed the laws of Wisconsin and Minnesota in construing the effect of a release of liability. It held that the judgment award should be reduced by the proportionate liability of the person who settled.

A waiver occurs when a party intentionally relinquishes a known right, either expressly or by conduct inconsistent with an intent to enforce the right. (*Sexton v. Smith* (1986), 112 Ill. 2d 187, 492 N.E.2d 1284; *Whalen v. K mart Corp.* (1988), 166 Ill. App. 3d 339, 343, 519 N.E.2d 991, 994; *Harris v. Faultfinders, Inc.* (1981), 103 Ill. App. 3d 785, 431 N.E.2d 1205.) Waiver is an equitable doctrine invoked to further the interests of justice whenever a party initially relinquishes a known right. *Mollihan v. Stephany* (1977), 52 Ill. App. 3d 1034, 368 N.E.2d 465.

Here, the judgment as to Sterling-Breon was vacated by the court pursuant to the stipulation of plaintiff and Sterling-Breon. By entering the settlement and release, plaintiff gave up her known right to enforce that part of the verdict attributable to Sterling-Breon against the nonsettling defendants.

In *Bartels*, the court found that joint and several liability as stated in its statute existed to benefit the injured party and could be waived. Bartels gave a general release to a joint tortfeasor, which released the tortfeasor from any contribution act. The *Bartels* court stated:

"We also conclude that the following language in §9-10-07, NDCC, 'provided, however, that each shall remain jointly and severally liable for the whole award' is for the benefit of the injured party and can be waived.

The general release given to Hackney constituted a general release for all of his liabilities present and future, including contributions either specifically or by construction, and as a settling tort-feasor he is excluded as a party from any further action against any of the remaining nonsettling tort-feasors. Bartels' (plaintiff's) recovery from the nonsettling tort-feasors is limited to the percentage of negligence attributable to the remaining nonsettling tort-feasors as may be determined by the court or the jury, as the case may be.

In this instance, John Bartels, the plaintiff, through the release, waived the following underscored language of §9-10-07, NDCC:

> 'When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of the negligence attributable to each; *provided, however, that each shall remain jointly and severally liable for the whole award.*' " (Emphasis added by *Bartels* court.) (*Bartels*, 276 N.W.2d at 122.)

Section 4 of the Contribution Act provides for the retention of joint and several liability, which is a right benefitting the plaintiff. We find the right to jointly and severally enforce judgment under the Contribution Act is waived by a plaintiff who acts to cause vacatur of a judgment as to a primarily liable joint tortfeasor pursuant to a settlement.

St. John's-Fitzgerald next argues that principles of judicial estoppel should apply in the instant case to preclude plaintiff from assuming a different position than she held in the trial court. The doctrine of judicial estoppel states that when a party assumes one position in a legal pro-

ceeding, that party is estopped from assuming a contrary position in a subsequent legal proceeding. (*Department of Transportation v. Coe* (1983), 112 Ill. App. 3d 506, 509-10, 445 N.E.2d 506, 507-08.) This doctrine is inapplicable in the instant case, which involves supplemental proceedings.

St. John's-Fitzgerald next argues the trial court erred in assessing post-judgment interest. In light of our finding that the release reduced plaintiff's recovery by the amount of the compensatory damages award recoverable against Sterling-Breon, we agree. We need not address St. John's-Fitzgerald's contentions. We note, however, that the record does not support St. John's-Fitzgerald's argument concerning setoff. Jane Henry filed a separate lawsuit against St. John's-Fitzgerald and Sterling-Breon. The appeal of the dismissal of that suit was pending at the time of the settlement, which clearly delineated the two lawsuits involved. Jane Henry's settlement was distinct from plaintiff's settlement. No setoff would, thus, be available in plaintiff's action.

For the above reasons, we reverse and remand.

Reversed and remanded.

SPITZ, J., concurs.

JUSTICE GREEN, dissenting:

I agree with the majority in their well-expressed statement of the purposes of the Contribution Act (Ill. Rev. Stat. 1987, ch. 70, par. 302(a).) I also share their concern which arises because the judgment on appeal is not consistent with the purposes of the Contribution Act. However, I must dissent from decision of the majority because in attempting to be fair to St. John's-Fitzgerald and consistent with the purposes of the Contribution Act, the

decision (1) is unfair to plaintiff; (2) violates the express terms of the Contribution Act; and (3) is contrary to precedent binding upon us.

The majority treat the act of plaintiff in settling with Sterling-Breon after judgment and pending appeal as a waiver of any liability owed by St. John's-Fitzgerald beyond 7% of the amount of the joint and several judgment entered on the jury verdict for compensatory damages as modified by the circuit court. The majority correctly points out that section 2(c) of the Contribution Act states that "[w]hen a release *** is given in good faith to one [joint tortfeasor], it does not discharge any of the other tortfeasors" unless so stated but reduces recovery against others by the amount paid. (Ill. Rev. Stat. 1987, ch. 70, par. 302(c).) The majority does not maintain the settlement was not in good faith nor does the majority take the position that the settlement fully released St. John's-Fitzgerald, as would have been the case prior to the Contribution Act, and might well be the case if the settlement was not in good faith.

Rather, the majority relies on the cases of *Bartels v. City of Williston* (N.D. 1979), 276 N.W.2d 113, and *Prudential Life Insurance Co. v. Moody* (Ky. 1985), 696 S.W. 2d 503, in support of their theory. The *Bartels* court construed a statute concerning contribution, very similar to ours, in the context of a statute on comparative negligence which provided in tort cases for the jury to render separate verdicts as to each defendant, fixing damages in proportion to the fault of that defendant, but also stated the liability of the defendants was joint and several. The court concluded that based upon the construction given to the comparative negligence statute by the State from which it was adopted, in cases where one of the tortfeasors has settled with the plaintiff, the amount of judgment even-

tually awarded is reduced, not by the amount of the settlement but by the percentage of fault found by the trier of fact to be attributable to the settling tortfeasor. That rule was held to prevail over a position in the legislation regarding compensation which stated, as does section 2(c) of the Contribution Act, that the judgment is reduced by the amount obtained from the release. *Prudential* concerned the operation of a comparative negligence statute which limited joint liability of joint tortfeasors to that for costs.

Subject to the provisions of sections 2-1116, 2-1117, and 2-1118 of the Civil Practice Law (Ill. Rev. Stat. 1987, ch. 110, pars. 2-1116, 2-1117, 2-1118), which were not in force at times pertinent here and would not be applicable to these facts, the statutory format in Illinois is to spread fault in most tort cases proportionately among tortfeasors indirectly through third-party action and cross-complaints under the Contribution Act rather than through directly apportioning the liability of each tortfeasor to the injured party. All tortfeasors remain jointly and severally liable to the injured party. (*Coney v. J.L.G. Industries, Inc.* (1983), 97 Ill. 2d 104, 454 N.E.2d 197.) There is no statutory provision or common law rule similar to that in *Bartels* whereby the proportion of liability of each defendant to the plaintiff is directly determined.

The Contribution Act, indirectly, achieves ultimate proportionate responsibility unless a joint tortfeasor is insolvent. The post-judgment settlement pending appeal is not what destroyed proportionality here. The majority does not dispute that plaintiff could have sought satisfaction of its entire judgment for compensatory damages from St. John's-Fitzgerald and the latter could not have prevented them from doing so nor could St. John's-Fitzgerald have obtained any contribution from Sterling-Breon. Proportionate ultimate financial responsibility was defeated here be-

cause, unfortunately, St. John's-Fitzgerald failed to file a timely claim for contribution. In late 1984, the supreme court held in *Laue v. Leifheit* (1984), 105 Ill. 2d 191, 473 N.E.2d 939, that if a tort action is brought, alleged tortfeasors seeking contribution from others must join their claims for contribution in the tort action. This was not always done previously. In the short time span involved here, filing a claim for contribution was overlooked by St. John's-Fitzgerald until after the evidence had been presented in the trial on the merits and the circuit court ruled the request was untimely and denied it. Had St. John's-Fitzgerald timely made such a claim, it could have required Sterling-Breon to reimburse it to the extent St. John's-Fitzgerald had paid plaintiff more than St. John's-Fitzgerald's proportionate share of the joint and several judgment.

St. John's-Fitzgerald rightfully calls our attention to the confusion and ambiguity in the record here. The form of the verdict could be taken to indicate that separate judgments in separate amounts were being entered as to the several defendants. In our opinion, modified upon denial of petition for rehearing in the underlying case, we concluded with the following statement:

> "Therefore, we affirm the jury verdict less the court-ordered remittitur as to medical expenses and affirm St. John's-Fitzgerald's responsibility for 7% thereof." (*Henry v. St. John's Hospital* (1987), 159 Ill. App. 3d 725, 735, 512 N.E.2d 1044, 1050.)

This also could be taken to indicate we affirmed the judgment against St. John's-Fitzgerald only to the extent of 7% of the amount of the compensatory damages. However, despite the foregoing, in view of the undisputed continued existence of the rule of joint and several liability as applied to the situation here, where there was no con-

tention of negligence attributable to plaintiff, the foregoing can only be construed to consist of the award of a joint and several judgment for the compensatory damages as modified and an affirmance of the same. Sterling-Breon had filed cross-complaints against St. John's-Fitzgerald for contribution, and the fixing of degrees of fault among the various defendants can be attributed to those claims.

In summary, I conclude: (1) under common law precedent, the liability of all defendants to plaintiff was joint and several and she could look to any one of them for satisfaction of the judgment rendered; (2) under section 2(c) of the Contribution Act, any good-faith settlement with one or more of the defendants reduces the liability of other defendants to her only in the amount of the settlement; (3) neither statute nor case law precedent changes the operation of the foregoing principles because the settlement was made pending appeal from an existing judgment; and (4) any fairness to St. John's-Fitzgerald, awarded them by the majority because of their unfortunate predicament, results in corresponding unfairness to plaintiff, who was entitled to rely on existing law in settling with Sterling-Breon. Accordingly, I would affirm the judgment of the circuit court.

APPENDIX 3

[159 Ill. App. 3d 725]

ERICA HENRY, by her Mother and Next Friend, Jane Henry, Plaintiff-Appellee, v. ST. JOHN'S HOSPITAL *et al.*, Defendants-Appellants, and (Breon Laboratories, Inc., *et al.*, Defendants-Appellees; Thomas O'Hern, Defendant).

Fourth District No. 4-86-0604

Judgment affirmed.

Opinion filed August 24, 1987.—Modified on denial of rehearing September 29, 1987.

* * * * *

Appeal from the Circuit Court of Sangamon County; the Hon. Richard J. Cadagin, Judge, presiding.

* * * * *

JUSTICE McCULLOUGH delivered the opinion of the court:

Defendants St. John's Hospital and Dr. Shari Fitzgerald (St. John's-Fitzgerald) appeal a jury finding in plaintiff's favor in her medical malpractice action. St. John's-Fitzgerald argues the trial court erred: in its rulings on directed verdict and judgment notwithstanding the verdict with regard to them; in denying St. John's-Fitzgerald's motion to dismiss a counterclaim; in denying St. John's-Fitzgerald's motion to file a counterclaim; and in instructing the jury. St. John's-Fitzgerald also argues the compensatory damages award was excessive.

We affirm.

The genesis of this action is a medical malpractice-products liability claim brought by plaintiff, a minor. Plaintiff has cerebral palsy. Prior to her birth, her mother was

given two paracervical blocks using the drug Marcaine (bupivacaine). The first paracervical block was administered by her physician, Dr. Thomas O'Hern. The second paracervical block was administered by a hospital resident, Fitzgerald. Immediately after administration of the second paracervical block, plaintiff suffered an episode of bradycardia (abnormally slow fetal heartbeat), which lasted until her birth. Plaintiff sued O'Hern, Fitzgerald, the manufacturer and distributor of Marcaine, and St. John's Hospital on a theory of *respondeat superior*.

The trial court directed a verdict in favor of O'Hern. The court found as a matter of law that Fitzgerald and thus, St. John's Hospital, violated the standard of care and directed a verdict as to that issue. The court left open the causation issue. The jury returned a verdict against the resident, the hospital, the manufacturer of the drug, and the distributor of the drug. It assessed $10 million in compensatory damages. The compensatory damages award was apportioned between the parties, with St. John's-Fitzgerald responsible for 7% of the award. Subsequently, the trial court reduced the medical expenses portion of the compensatory damages award to $11,759. The products liability defendants settled. Only the facts necessary to a determination of the issues raised by St. John's-Fitzgerald will be addressed.

Plaintiff's mother, Jane Henry, entered St. John's Hospital for the induction of labor. Her pregnancy had been uncomplicated; however, O'Hern testified that he was concerned she might reach a post-mature state. O'Hern attached an external fetal monitor, which showed a good fetal heart variability and rate. He then started a drug to induce labor. At 10:30 a.m., O'Hern attached an internal fetal monitor and administered 8 cc's of Marcaine bilaterally at the 3 o'clock and 9 o'clock positions. After

completing the paracervical block, he observed the fetal heart monitor for 15 minutes, during which time the fetal heart rate and beat variability were unchanged. O'Hern left and went to his office.

Jane Henry testified the paracervical block provided some relief but the relief lasted only 10 to 15 minutes. Fitzgerald administered the second block. Fitzgerald testified that she was a first-year resident at St. John's Hospital doing her first rotation in obstetrics when she administered a second paracervical block to Jane Henry at 11 a.m. It took her 10 minutes to complete the procedure, which she performed using a method she had been taught. She injected 6 cc's of Marcaine on the left side, and although she filled the syringe to 4 to 5 cc's for the right side, she lost a lot of the drug prior to injection.

O'Hern was called back to the hospital and told bradycardia had developed. Plaintiff, Erica, had lapsed into severe bradycardia for at least five minutes prior to O'Hern's return. Bradycardia is evidence of fetal distress. If sudden and prolonged, it may be evidence of fetal asphyxia. Additionally, bradycardia can cause asphyxia.

O'Hern was told that a repeat block had been given at 11:10 a.m. O'Hern stated that he had seldom seen severe bradycardia but the effect of anesthesia is dose-related. The labor flow charts indicated that Jane Henry was given an additional 6 cc's of Marcaine per side. He did not authorize the second block and would not have administered 6 cc's per side in addition to the previous dosage within 30 minutes of the initial dose. O'Hern stated that he would not have given a repeat block on both sides because the nursing notes indicate that the patient complained of pain only on her left side. However, the determination of when a repeat block is necessary is a matter of judgment, and one may be appropriate within 30 minutes.

O'Hern further stated it is not acceptable practice in the Springfield medical community for a second paracervical block to be given without authorization from the attending physician. O'Hern admitted wide variations in maximum dosage amounts are recommended in medical literature.

Dr. John Marty, a partner of Dr. O'Hern who had also treated Jane Henry, stated only the attending physician has the authority to authorize a repeated paracervical block. He would wait 90 minutes prior to repeating the block. Neither O'Hern nor Marty authorized the second paracervical block. It was not accepted medical practice for a repeat block to be given within one-half hour of the first paracervical block, absent authorization. After the first block in the instant case, the fetal heart rate was good. Thirteen and one-half minutes after the second block, the fetal heart rate dropped drastically, and fetal heart-beat variability decreased markedly. Marty testified that the bradycardia occurred precisely where he would expect it to occur if it were from the Marcaine.

Michael Gast, a board-certified obstetrician, testified for the drug company and distributor. In his opinion, it was below the standard of care for a resident to administer a paracervical block absent prior consultation with a senior physician. He also questioned the method and amount of Marcaine given during the second paracervical block.

Ernest Ertmoed, the chief obstetrical resident at St. John's Hospital and a clinical assistant professor, testified that a reblock would be equal to a full dosage of Marcaine, between 8 and 10 cc's on each side. A supplemental paracervical block would be a few cc's of Marcaine, usually no more than one-half of the first dosage given. While it would be unusual for a resident to administer a full reblock without consultation, it is not unusual for

residents to administer supplemental paracervical blocks without prior consultation with the attending physician.

Ertmoed further testified that it was in accord with the standard of care for a resident physician in Springfield to give a supplemental paracervical block of up to one-half of the original dosage absent prior authorization. He admitted, however, that more than one-half of the original dose was given in the instant case.

Fitzgerald testified that she did not talk to O'Hern prior to administering the second paracervical block. She agreed that nursing notes stated she gave 6 cc's of Marcaine on each side. After plaintiff's birth, Fitzgerald amended the nursing notes to show a lesser dosage. Ordinarily, a physician does not write on the labor flow chart or amend nursing notes.

Erica Henry, plaintiff, was not breathing when born and was placed in a high-risk nursery. She remained in the nursery for several days. Dr. Thomas Cisezk, a board-certified pediatrician and neonatologist, discussed the possibility of long term neurological damage with Erica's parents, prior to her discharge. Cisezk stated that based upon Erica's condition immediately after birth, she suffered a period of oxygen deprivation and respiratory distress secondary to asphyxia. There is no specific test performable immediately after birth which will relate whether an infant has suffered brain damage. At 24 months, Erica was diagnosed as having severe cerebral palsy and psychomotor retardation because of severe asphyxia.

Cisezk stated that Erica had permanent neurological damage. Based on a reasonable degree of medical certainty, it is likely that the perinatal asphyxia was related to the bradycardia prior to delivery. The asphyxia, absent a predisposition for cerebral palsy, was likely related to

the developmental delay. Erica will require future long-term care.

Suzanne Miller, a board-certified pediatrician and neurologist, examined and treated Erica. Her preliminary diagnosis was that Erica suffered encephalopathy (cerebral palsy) due to perinatal hypoxia. Static encephalopathy implies that a single insult occurred at a specific time which led to the child not receiving full neurological function. Miller did not believe any evidence of congenital brain malfunction existed. She suspected the second paracervical block caused the injury, but admitted that she was speculating because she had not examined the child immediately after her birth.

O'Hern testified that it was reasonably likely the bradycardia was related to the second paracervical block. The depressed state of the child at birth was very likely related to the bradycardia. The fetus showed no signs of distress until after the second paracervical block. Marty testified that after the first paracervical block, the fetal heart monitor tracing showed good beat and beat variability, which indicated an intact central nervous system. After the second paracervical block, the beat and beat variability dropped, indicating fetal asphyxia.

Ira Bergman, a board-certified pediatrician and neurologist, stated that in his opinion the events surrounding Erica's birth did not cause her cerebral palsy. He believed the cerebral palsy was a congenital problem with neurons. Gast stated residents frequently give paracervical blocks and depending on the level of the resident, on occasion give them without specific authorization. No more than 50 mg's of Marcaine should be given in a 90-minute period. Gast admitted that if Fitzgerald started the second paracervical block and finished it at 11:10, the heart tracing

showed the onset of bradycardia in a time frame which he would expect it if caused by the Marcaine.

The parties produced extensive testimony concerning the adequacy of the warning about Marcaine's hazards.

Initially, St. John's-Fitzgerald argues that the trial court erred in directing a verdict against it on the issue of negligence. Defendant argued that controverted issues of fact exist as to the appropriate time, dosage, and technique of administration of the second paracervical block. Defendant contends plaintiff failed to establish a standard of care or violation of the standard of care with regard to Fitzgerald's conduct. Secondly, St. John's-Fitzgerald argues that a conflict exists as to Fitzgerald's authority to administer the second paracervical block. The plaintiff argues that the testimony showed Fitzgerald administered too much Marcaine, too soon, with a faulty technique, and without authority.

A directed verdict or judgment notwithstanding the verdict is proper only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand. (*Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418, 423, 328 N.E.2d 301, 305; *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 200 N.E.2d 504; *Lebrecht v. Tuli* (1985), 130 Ill. App. 3d 457, 473 N.E.2d 1322.) In medical negligence actions, plaintiff must establish the appropriate standard of care. Then, plaintiff must establish by affirmative evidence that defendant's conduct violated that standard of care and that defendant's lack of skill or care caused harm to plaintiff. (*Walski v. Tiesenga* (1978), 72 Ill. 2d 249, 256, 381 N.E.2d 279, 282.) Expert testimony is usually needed to establish these elements; however,

a defendant doctor's testimony may be used to establish these elements. *Metz v. Fairbury Hospital* (1983), 118 Ill. App. 3d 1093, 455 N.E.2d 1096.

In the instant case, the record supports St. John's-Fitzgerald's contention that the standard of care and Fitzgerald's violation of the standard of care were not established as to the time of administration, dosage amount, and technique. However, O'Hern, Marty, and Gast stated that it was a violation of the standard of care for a resident to administer a repeat block without consultation with the attending or a more senior physician. It is not disputed that Fitzgerald gave more than a supplemental paracervical block in the instant case. Gast admitted that residents do administer paracervical blocks. However, he felt consultation was necessary prior to administering this dosage of Marcaine. Ertmoed stated that administration of a supplemental paracervical block by a resident without prior authorization was customary and complied with the standard of care. However, he defined a supplemental block as one containing up to one-half of the initial dosage and admitted that Fitzgerald administered more than a supplemental dosage in the instant case.

Considering the evidence most favorable to Fitzgerald, all of the expert testimony stated her conduct was contrary to the standard of care. St. John's Hospital's liability was predicated on the employment relationship between it and Fitzgerald. Therefore, the trial court was correct in entering a directed verdict on this issue.

St. John's-Fitzgerald next argues that the trial court erred in denying its motion for directed verdict at the close of plaintiff's case. It argues plaintiff failed to present any evidence that Fitzgerald's actions caused the bradycardia, resultant hypoxia, and injury.

Plaintiff has the burden of proving that defendant's actions more probably than not caused the injury. (*Eberle v. Brenner* (1985), 131 Ill. App. 3d 394, 475 N.E.2d 639.) A brief review of the evidence is necessary. Ciszek testified that plaintiff suffered oxygen deprivation and respiratory distress, secondary to asphyxia. Absent predisposition, he believed to a reasonable degree of medical certainty that it was likely that the asphyxia was related to the bradycardia. Miller stated that she suspected the second block caused the difficulty, but admitted that since she had not examined the child her opinion was somewhat speculative. O'Hern testified that it was reasonably likely that the bradycardia was related to the second paracervical block. Marty testified that the fetus was in fine condition until the second block. Gast and Bergman testified that the bradycardia was principally caused by post-maturity and umbilical cord compression. However, Gast admitted that the bradycardia started precisely where he would expect it to start if caused by the Marcaine, and drug intoxication and side effects are dose-related. The question in the instant case is one of proximate causation. A conflict in expert testimony on this issue appears. Therefore, directed verdict was properly denied.

St. John's-Fitzgerald argues that the trial court erred in denying its motion for judgment notwithstanding the verdict on the above issues. The standard of review in determining the propriety of a directed verdict is the same as that for determining the propriety of a judgment notwithstanding the verdict. No error occurred in the instant case.

St. John's-Fitzgerald next argues that the trial court erred in not striking the products liability defendants' counterclaims against it, in denying its motion to file a counterclaim for contribution against them, and in instruct-

ing the jury. As affirmative defenses, the products liability defendants alleged plaintiff's injuries were also caused by the conduct of other people. They alleged in a counterclaim that Fitzgerald negligently administered the second paracervical block, assumed the risk of using Marcaine, and misused the drug. After the close of the evidence, St. John's-Fitzgerald moved to file a contribution counterclaim against the drug manufacturer and distributor. The court denied the motion as untimely.

St. John's-Fitzgerald argues assumption of the risk is not a valid defense in a failure to adequately warn products liability case since one cannot assume an unknown risk, the trial court erred in failing to dismiss the claim for failure to state a cause of action, and a party who is engaged in wilful and wanton behavior should not be able to seek contribution.

The contentions raised by St. John's-Fitzgerald were recently addressed in *J. I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.* (1987), 118 Ill. 2d 447. The court found that principles of assumption of the risk and misuse do not readily fit within the context of contribution. The operative consideration is the negligence of the codefendant. Here, the counterclaims included allegations of negligence, assumption of the risk, and misuse as a basis of contribution. The trial court did not err in denying the motion to dismiss.

St. John's-Fitzgerald argues the trial court erred in denying its motion to file a counterclaim for contribution against the drug manufacturer and distributor. The motion was made after the close of all evidence and prior to the instruction conference. The allowance of a motion to amend a pleading is addressed to the sound discretion of the trial court. (*Taylor v. City of Beardstown* (1986),

142 Ill. App. 3d 584, 491 N.E.2d 803; *Morris v. City of Chicago* (1985), 130 Ill. App. 3d 740, 474 N.E.2d 1274.) Amendments during trial should not ordinarily be permitted if the amendments concern matters which the pleader knew of at the time of the original pleading. The prejudice and surprise of the other party should also be considered. 130 Ill. App. 3d 740, 474 N.E.2d 1274.

Here, the amendment raised a new issue after the parties had rested their cases. The drug manufacturer and distributor would not have had an opportunity to present evidence rebutting the issues raised in St. John's-Fitzgerald's proposed contribution counterclaim. St. John's-Fitzgerald knew of a possible contribution action throughout. We find that the trial court did not abuse its discretion in denying the motion, as it was not raised in a timely fashion.

The verdict form in the instant case did not contain a separate finding on the contribution counterclaim of the drug manufacturer and distributor. St. John's-Fitzgerald argues this was error. We do not agree. It is only when the comparative negligence of plaintiff and the contribution counterclaims among defendants are raised in the same cause and the jury must return separate verdicts on the claims. See generally *Ogg v. Coast Catamaran Corp.* (1986), 141 Ill. App. 3d 383, 490 N.E.2d 111.

Finally, St. John's-Fitzgerald argues the jury's verdict was influenced by passion and prejudice and was so large as to shock the conscience of the court. The ascertainment and assessment of damages are questions of fact peculiarly within the province of the jury. Reviewing courts must be reluctant to interfere with the discretion of the jury, and the determination of damages will not be disturbed on appeal unless it is obviously the result

of passion or prejudice, or is clearly excessive. An award is considered excessive if it falls outside the necessarily flexible limits of fair and reasonable compensation or is so large as to shock judicial conscience. (*Clay v. Brodsky* (1986), 148 Ill. App. 3d 63, 499 N.E.2d 68; *Ludgin v. John Hancock Mutual Life Insurance Co.* (1986), 145 Ill. App. 3d 703, 495 N.E.2d 1237.) A precise dollar amount of compensation for pain and suffering or permanent disability is not necessarily related to the amount of medical expenses. Medical bills are not conclusive as to the appropriate size of a verdict. (*Ludgin v. John Hancock Mutual Life Insurance Co.* (1986), 145 Ill. App. 3d 703, 495 N.E.2d 1237.) Considering the nature of the injuries in the instant case, we cannot say that the damages award is so large as to shock judicial conscience. Therefore, we affirm the jury verdict less the court-ordered remittitur as to medical expenses and affirm St. John's-Fitzgerald's responsibility for 7% thereof.

For the above reasons, we affirm the trial court.

Affirmed.

SPITZ, P.J., and GREEN, J., concur.

APPENDIX 4

Order Denying Petition for Rehearing
(entered on 11/30/90
in the Illinois Supreme Court)

Graham & Graham
Attorneys at Law
1201 S. 8th St.
Springfield, IL 62703

No. 68659—Erica Henry, etc., appellant, v. St. John's Hospital, et al., appellees. Appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Opinion modified on denial of rehearing.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 10, 1990.

APPENDIX 5

Verdict of the Jury

We, the Jury, find for the plaintiff and against the following defendants and determine their pro-rata share of compensatory damages in the following amounts:

☒	Sterling Drug Inc.	46.5%
☒	Breon Laboratories, Inc.	46.5%
☒	St. John's Hospital/Dr. Shari Fitzgerald	7.0%
	TOTAL	100.0%

(You should mark an "×" in the box next to the name of each defendant you find against--the shares of the defendant or defendants must add up to 100%. Any defendant you find for must have a "0" share.)

We, the Jury, find for the plaintiff and assess compensatory damages as follows:

Disability	$ 6,000,000.00
Disfigurement	$ 1,000,000.00
Pain & Suffering	$ 1,500,000.00
Medical Expenses	$ 1,500,000.00
TOTAL	$10,000,000.00

[Signatures of Jurors omitted in printing]

Correspondence from Circuit Court Judge (dated 8/18/86)

Re: Henry v. St. John's, et al.
No. 83-L-395

Gentlemen:

The following docket entry was entered in the above-entitled cause this date:

> "Defendant's Post-trial Motion allowed to the extent that the jury verdict of $1,500,000 for medical expenses is reduced to the sum of $11,759.00, thereby granting judgment for the Plaintiff and against the Defendants for the sum of $8,511,759.00 for compensatory damages. Denied in all other respects. Cause stricken."

Very truly yours,

/s/ Richard J. Cadagin
Circuit Judge

Docket Entry Sheet
(in the Circuit Court)

Re: Henry v. St. John's, et al.
No. 83-L-395

* * * * *

1-21-86 Jury retires to deliberate at 1:30 P.M. Jury returns in open court at 8:10 P.M. with their verdicts as follows:

We, the jury, find for the plaintiff and against the following defendants and determine their pro-rata share of compensatory damages in the following amounts:

Sterling Drug, Inc.	46.5%
Breon Laboratories, Inc.	46.5%
St. John's Hospital/Dr. Shari Fitzgerald	7.0%
	100.0%

Disability	$ 6,000,000.00
Disfigurement	$ 1,000,000.00
Pain & Suffering	$ 1,500,000.00
Medical Expenses	$ 1,500,000.00
TOTAL	$10,000,000.00

We, the Jury, find that Defendants, Sterling and Breon were guilty of acts of wilful and wanton conduct and assess punitive damages against them in the following sum: $7,000,000.00
RJC/asc DE

* * * * *

8-18-86 Defendant's post-trial motion allowed to the extent that the jury verdict of $1,500,000 for medical expenses is reduced to the sum of $11,759,000, thereby granting judgment for the plaintiff and against the defendants for the sum of $8,511,759, for compensatory damages. Denied in all other respects. Cause stricken. RJC/DJC

* * * * *

5-27-87 Present Bruce Cook, Rich Wilderson, Alex De-Saint Phalle, Alfred LaBarre, and Gal George Kenney. Cause comes on for hearing on Presentation of Settlement Order between Plaintiff and Sterling Drug. Special and Limited Appearance to Object to Object to Jurisdiction filed by St. John's Hospital and Shari Fitzgerald argued and denied. Witness sworn: evidence heard. Court finds settlement to be a good faith settlement and approves same. RJC/djc BJD.

* * * * *

APPENDIX 6

[Filed October 3, 1986]

IN THE
CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, SANGAMON COUNTY, ILLINOIS

No. 83-L-395

ERICA HENRY, by her mother and next friend, JANE HENRY,

Plaintiffs,

v.

ST. JOHN'S HOSPITAL; BREON LABORATORIES, INC.; DR. THOMAS O'HERN; STERLING DRUG, INC.; and DR. SHARI FITZGERALD,

Defendants.

APPEAL BOND

St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, an Illinois not-for-profit corporation, and St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, an Illinois not-for-profit corporation, on behalf of Dr. Shari Fitzgerald, as principals, and The Travelers Indemnity Company, as surety, are held and firmly bound unto Erica Henry, by her mother and next friend, Jane Henry, plaintiffs, in the sum of SIX HUNDRED TWENTY FIVE THOUSAND AND NO/100 DOLLARS ($625,000.00) lawful money of the United States of America, for the payment of which sum we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

The need for this Appeal Bond arises out of the appeal by St. John's Hospital and Dr. Shari Fitzgerald, Defen-

dants, of final judgments entered in the above case by the trial court.

This Appeal Bond is conditioned upon the prosecution of the appeal by St. John's Hospital and Dr. Shari Fitzgerald and payment by St. John's Hospital and Dr. Shari Fitzgerald of the final judgments, interest, damages and costs (to the extent of $625,000.00) in case the final judgments are affirmed on appeal or in case the appeal is dismissed. This Appeal Bond shall be cancelled if St. John's Hospital and Dr. Shari Fitzgerald comply with this condition of payment.

Principals:

ST. JOHN'S HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, an Illinois not-for-profit corporation,

BY: _____
Exec. Vice President

ST. JOHN'S HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, an Illinois not-for-profit corporation on behalf of Dr. Shari Fitzgerald,

BY: _____
Secretary

Surety:

THE TRAVELER'S INDEMNITY COMPANY,

BY: _____
Its: Attorney-in-Fact

Dated: October 3, 1986

APPENDIX 7

Special and Limited Appearance to Object to Jurisdiction (Or, in the Alternative, To Object to Settlement)

(Filed on 5/27/87 in the Illinois Circuit Court)

Re: Henry v. St. John's, et al.
No. 83-L-395

SPECIAL & LIMITED APPEARANCE
TO OBJECT TO JURISDICTION

* * * * *

4. There is no provision in the law of this state for a post judgment finding that a settlement was made in good faith. Plaintiff and defendants, Sterling and Breon are attempting to significantly and prejudicially affect the rights of these defendants, St. John's Hospital and Dr. Shari Fitzgerald to pursue their statutory and common law claims for contribution and otherwise against defendants Sterling and Breon, should the necessity for same arise. The petition filed herein by plaintiff on its face indicates that plaintiff intends to not settle claims against St. John's or Dr. Fitzgerald but yet seeks a finding that the $7,905,000 compensatory verdict against defendants, Sterling and Breon, plus the $7,000,000 punitive damage award against Sterling and Breon can be compromised for $3,350,000 (approximately 22%).

5. In addition to there being no statutory authority for a good faith settlement, further indication of there being no "good faith" is a provision in the petition and apparently in the settlement contract that plaintiff has agreed to indemnify defendant Sterling and Breon for any claim against them by any party and specifically, St. John's Hospital and Dr. Shari Fitzgerald. Should the cases be reversed on appeal and a retrial had, this attempted collusion between plaintiff and defendants, Sterling and

Breon would be extremely prejudicial to these defendants and constitutes a conspiracy to restrain the constitutional and statutory right of action by these defendants against Sterling and Breon for their previously determined willful and wanton and grossly negligent conduct in the production, distribution and sale of Marcaine.

6. There is likewise, no economic justification for this purported settlement for less than the full amount presently owing and (for which a bond has been posted) and in view of the net worth of Sterling Drug, which at the time of trial was testified to be in excess of $900,000,000. The acceptance by plaintiff of anything less than the full judgment against Sterling would indicate an acceptance of the amount in lieu of the 93% of the comparative damage judgment (and the entire punitive damage judgment) and any further attempt to collect any portion of the 93% would be void. Plaintiff's acceptance of the $3,350,000 settlement shall constitute the entire pro rata share of Sterling-Breon's 93% percent of the total judgment. St. John's Hospital-Dr. Fitzgerald's relative share of fault as found by the jury of 7% remains intact and they share no responsibility for any greater portion due to any acts of Sterling-Breon and plaintiff. "No tort feasor is liable to make contribution beyond his prorata share of the common liability, Ch. 70, §301(b).

7. This court has previously heard extensive post trial motions by defendants including Sterling and Breon, which were vigorously opposed by plaintiff seeking, among other things, a reduction in the damage awards. This court denied those motions and thus those actions constitute the law of the case. This court cannot now explicitly or implicitly alter the damage awards and particularly not with the potential prejudice of these defendants, St. John's

Hospital and Dr. Shari Fitzgerald. This court has also earlier approved St. John's Hospital bond in the amount of $600,000 indicating again a recognition of the 7% relative culpability of St. John's and Dr. Fitzgerald as found by the jury. Any attempt to alter the jury's decision in that regard is a flagrant violation of the constitutional rights of these defendants to trial by jury as well as a blatant attempted misuse of the contribution act.

8. A settling tort feasor is not entitled to contribution from another tort feasor whose liability is not extinguished by the settlement. Ch. 70½, §302(e). Yet this exact prohibition could be violated if the petition herein is approved and if the verdicts are affirmed, and an attempt is made to recover more than the 7% verdict from St. John's-Dr. Fitzgerald. That scenario would effectively permit Sterling to shift its liability to St. John's, in violation of the Contribution Act and a violating of their right to a jury trial (R. 2893-2897).

[Signature and Proof of Service omitted in printing]

APPENDIX 8

Petition for Instructions
(filed on 6-29-87 in the Illinois Appellate Court, Fourth District)

Re: Henry v. St. John's, et al.
No. 4-86-0604
No. 4-86-0610

PETITION FOR INSTRUCTIONS

* * * * *

During the pendency of these consolidated appeals on or about May 18, 1987, plaintiff Erica Henry, by her mother, Jane Henry, filed a petition for approval of minor's settlement, for a finding that the minor's settlement was made in good faith, and for finding that Jane Henry's settlement was made in good faith by the parties hereto, ... These appellants filed on May 27, 1987, a special and limited appearance to object to the jurisdiction of the Trial Court, and alternatively, to object to the good faith finding. . . . On May 28, 1987, the Honorable Richard J. Cadagin, Circuit Judge, made a finding that the settlement was in good faith and in the best interests of the minor and "in good faith to the parties".

* * * * *

. . . this purported good faith finding is an attempt to deprive these appellants of their constitutional rights to counter claim against Sterling and Breon for contribution, indemnity, or equitable apportionment or other potential remedies, and further attempts to alter the already existent jury determination of 7% relative fault on behalf of these Appellants.

There is no statutory authority for a "good faith" settlement in a post jury verdict and judgment situation such as here. If, arguably, such a settlement is possible, then

settlement with one defendant or group of defendants for less than their pro rata share should prima facie satisfy that entire pro rata share (i.e., leaving the sole remaining liability to plaintiff being 7%, or $595,000.00; the remaining 93% being eliminated by the plaintiff's voluntary choice to accept $3,000,000.00 in lieu of some $16,405,000.00). Acceptance by plaintiff of anything less than the full judgment against Sterling (particularly in view of the wilful and wanton findings) would indicate a willing acceptance of that amount in lieu of the 93% of the damage award and any further attempt to collect any portion of that 93% by plaintiff would be void. St. John's Hospital and Dr. Fitzgerald, having been found by the jury to be 7% at fault, share no responsibility for any greater proportion, for to do so would be an imposition of the responsibility of Sterling and Breon upon these appellants' in contravention of the jury's verdict, and due solely to the collusion between the plaintiff and defendants, Sterling and Breon.

Should this case be retried, following a reversal on appeal, the now court authorized indemnity of Sterling and Breon by plaintiff would purportedly preclude these appellants' constitutional and statutory rights to file counter claims against Sterling and Breon for contribution or otherwise, and would be extremely prejudicial to these defendants, and creates a conspiracy to restrain the constitutional, statutory and common law rights of action by these defendants against Sterling and Breon for their previously determined wilful and wanton grossly negligent conduct in the production, distribution and sale of Marcaine.

* * * * *

Order Denying Petition for Instructions
(entered on 7/15/87 in the
Illinois Appellate Court, Fourth District)

Re: Henry v. St. John's, et al.
No. 4-87-0433
(Sangamon Co. 83 L 395)

(Letterhead Of)

State of Illinois
APPELLATE COURT
Fourth District
Supreme Court Building
Springfield 62706

Appellants' "Suggestion to the Court" overruled.

Rule entered July 8, 1987 enforced. APPEAL DISMISSED.

(R. C2914)

Order Dismissing and Vacating Judgment As To Sterling/Breon (entered on 7/13/87 in the Illinois Circuit Court)

Re: Henry v. St. John's, et al.
No. 83-L-395

ORDER DISMISSING AND VACATING JUDGMENT

The Court having been advised by counsel for plaintiffs and for defendants Breon Laboratories Inc. and Sterling Drug Inc. that this action has been settled as between the aforesaid parties, and this Court having reviewed the terms and conditions of the Release and Settlement Agreement and Stipulation of Dismissal;

It is, therefore, ordered that the within action be and the same hereby is dismissed as against defendants Breon Laboratories Inc., Sterling Drug Inc. and all other divisions, subsidiaries and affiliates thereof with prejudice and on the merits and the judgment entered in this action against Breon Laboratories and Sterling Drug Inc. be and the same hereby is vacated. Each party shall bear its own costs and attorneys' fees.

/s/ Richard J. Cadigan
Circuit Judge

Dated: July 13, 1987

(R. C2911)

APPENDIX 9

Petition for Rehearing of St. John's Hospital and Dr. Shari Fitzgerald (filed on 9/4/87 in the Illinois Appellate Court, Fourth Judicial District)

Re: Henry v. St. John's et al.
Fourth District No. 4-86-0604

* * * * *

The verdict form shown at Appendix A of these defendants' original brief in this Court, clearly indicates that the jury is to "determine their pro rata share of compensatory damages in the following amounts:". The jury, of course, entered a seven per cent (7%) finding for St. John's Hospital/Dr. Fitzgerald, and this Court, in its opinion, has acknowledged and affirmed that finding at Page 2.

* * * * *

Should the Court deny this Petition, we assume that it is taken for granted that the judgment, insofar as it is relates to this St. John's Hospital, is $595,823.13 (7% of $8,511,759.00), given the jury verdict finding this St. John's Hospital/Dr. Fitzgerald of a seven per cent (7%) responsibility.

* * * * *

Our conclusion, therefore, is that to say that the verdict as to St. John's, is $10,011,759.00, less the reduction of $1,500,000.00, and now reduced by the settlement of $3,350,000.00, or some $6,000,000.00, is to do violence to the Contribution Act and is a construction which is contrary to one of the basic tenets of the United States and State of Illinois Constitutions that a person or party shall have a right to present his claim in a recognized forum for resolution and that right is fundamental to our due process considerations of the Fourteenth Amendment of the U. S. Constitution. This right to present a claim is one

which cannot be cut back on or eliminated either by statutory implementation or by judicial construction. The point is well made in *Brinkerhoff-Faris Trust v. Walter O. Hill* 281 U.S. 673 (1929), where a tax collector attempted unsuccessfully to refuse repayment of an inappropriate tax collection regarding bank stock shares.

The court there said that it is a fundamental concern to our Constitutional mandates that the plaintiff "be accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support". "Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission, . . . But while it is for the state courts to determine the adjective, as well as the substantive law of the state, they must, in so doing, accord the parties due process of law."

"Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it". *Brinkerhoff* at Page 681-682.

That Supreme Court said that a party has a right to present his position. This right is of constitutional dimensions. Here, this jury has determined that St. John's Hospital has only a seven per cent (7%) responsibility in this matter.

The point we make, then, is even the slightest suggestion that the verdict, and consequently the judgment, against this St. John's Hospital, is anything other than a $595,823.13 is obviously a construction in violation of St. John's Hospital's due process considerations, and more expressly so than in *Brinkerhoff* (where the court held that a person has a right to present a claim) because here

the jury *has actually determined* the exact scope of the hospital's interest in this situation.

* * * * *

Should this Court deny this petition for rehearing, it is respectfully requested that the Court clarify its opinion regarding the relative fault of St. John's Hospital and the judgment to be entered by the Trial Court. These defendants submit that this Court has acknowledged the seven per cent (7%) responsibility of St. John's/Dr. Fitzgerald, and if the Court denied this motion, it is requested that this Court order that judgment be entered in that amount. (See also these defendants' Appeal Bond approved by the Trial Court in the amount of $625,000.00 [$525,999.00 plus potential Interest]) (R. C2842).

* * * * *

APPENDIX 10

Petition for Entry of Judgment Pursuant to Jury Verdict or in the Alternative Petition for Relief from Judgment Pursuant to Section 2-1401, Chapter 110 (filed on 5/6/88 in the Illinois Circuit Court)

Re: Henry v. St. John's, et al.
No. 83-L-395

* * * * *

. . . on June 29, 1987, these defendants, St. John's Hospital and Dr. Shari Fitzgerald, filed their Petition for Instructions of the Court objecting to the proposed settlement on the basis that the thought may be that plaintiff was going to later claim that the jury verdict remained intact in full as to these defendants, St. John's Hospital and Dr. Shari Fitzgerald, notwithstanding the jury verdict regarding apportionment and notwithstanding the settlement with Breon Laboratories, Inc. and Sterling Drug, Inc. This Petition for Instruction was filed in No. 4-86-0605 and 4-86-0610.

* * * * *

. . . on July 8, 1987, the Appellate Court denied the Petition for Instruction filed by St. John's Hospital and Dr. Shari Fitzgerald.

* * * * *

Thereafter, the opinion was filed by the Appellate Court on August 24, 1987, in Docket No. 4-86-0604. There are specific findings in that opinion, at Page 2, for example, dealing with the issues of apportionment "The compensatory damages award was apportioned between the parties with St. John's-Fitzgerald responsible for 7% of the award."

A Petition for Rehearing was filed by St. John's Hospital and Dr. Shari Fitzgerald.

The Appellate Court denied the Petition for Rehearing. However, it is noted that Page 14 of the opinion was modified to read as follows:

> "Therefore, we affirm the jury verdict, less the court ordered remittitur as to medical expenses and affirm St. John's-Fitzgerald's responsibility for 7% thereof. For the above reasons, we affirm the trial court."

* * * * *

That these defendants, St. John's Hospital and Dr. Shari Fitzgerald, state that the jury verdict in the above entitled matter . . . was a finding of the jury that these defendants, St. John's Hospital and Dr. Shari Fitzgerald, has responsibility in the amount of 7% of the verdict.

* * * * *

WHEREFORE, these defendants, St. John's Hospital and Dr. Shari Fitzgerald, pray this court determine that its total responsibility in favor of the plaintiff is in the sum of $715,559.09, which sum constitutes 7% of the judgment, or $595,812.13, together with interest thereon at the rate of 9% thereon from January 21, 1986. And further, that these plaintiffs be directed to execute a release of the judgment in favor of this St. John's Hospital and Dr. Shari Fitzgerald, upon receipt of that sum, and failing that, that an officer of this court be duly authorized by this court to execute said release, and judgment in favor of this St. John's Hospital and Dr. Shari Fitzgerald in the above entitled matter.

* * * * *

In the alternative, these defendants, St. John's Hospital and Dr. Shari Fitzgerald, state that to hold otherwise than

as provided in . . . this Petition for Entry of Judgment Pursuant to Jury Verdict or in the Alternative Relief from Judgment Pursuant to Section 2-1401, Chapter 110 is to result in an unconstitutional taking of the property of these defendants, St. John's Hospital and Dr. Shari Fitzgerald, contrary to the due process provisions of the 14th Amendment of the United States Constitution and corresponding provision of the Illinois Constitution.

That the claim for contribution is a cause of action, a property interest whose dimensions have been fixed by the jury which has determined responsibilities in the relative portions of 7% and 93% of the total loss. That this cause of action, as now reduced to verdict, is one which cannot be abridged without running afoul of the due process provisions of the 14th Amendment of the United States Constitution and of the Illinois Constitution.

This petition is being brought in this manner to request that the court follow its ministerial duty of entering judgment in accordance with the jury verdict, or in the alternative, that it grant relief in accordance with Chapter 110, Section 2-1401 (the successor to the writ of error, coram nobis, and coram vobis) inasmuch as this is appropriate form of relief sought under that section of the act where relief is not otherwise available.

* * * * *

. . . that this type of settlement attempts to eliminate the cause of action created by this Contribution Act to implement the various rights and interests created by this Contribution Act in violation of the due process provisions of the 14th Amendment of the United States Constitution and the Illinois Constitution, . . . (R. C2945-2963).

* * * * *

APPENDIX 11

Order Denying Petition for Entry of Judgment

(Entered on June 9, 1988 in the Illinois Circuit Court)

Re: Henry v. St. John's, et al.
No. 83 L 395

ORDER

The Court having reviewed the motions of the parties, finds as follows:

The Court denies defendant, St. John's Hospital's motion to modify or reform the jury verdict. The Court finds that St. John's Hospital is jointly and severally liable for $8,511,759 as of January 21, 1986, and interest starts accruing thereon from that date.

The Court calculates the judgment and interest owing as of May 29, 1988, as follows:

Principal	$5,511,759.00
Interest 1/21/86 to 5/28/87 (492 days @ $2,099 per day)	1,032,708.00
Interest 5/28/87 to 5/29/88 ($1,359 per day)	496,035.00
TOTAL	$7,040,502.00

On the Court's own motion, plaintiff is ordered to refrain from any collection proceedings for 30 days after entry of this order.

DATED This 8 day of June, 1988.

ENTER:

/s/ RICHARD J. CADAGIN
JUDGE

APPENDIX 12

Appellant's Brief of
St. John's Hospital and Dr. Shari Fitzgerald
(filed in the Illinois Appellate Court,
Fourth Judicial District)

Re: Henry v. St. John's, et al.
Fourth District No. 4-88-0409

* * * * *

In this case the plaintiff is attempting to revise the jury's verdict and reallocate the proportionate shares, thereby forcing one defendant to pay an amount greater than its pro rata share of the whole. To allow the plaintiff to settle after verdict with the most culpable defendant and then proceed against the least culpable defendant for the full amount of the judgment is inconsistent with the Contribution Act and violates established and fundamental principles of fairness and equity.

* * * * *

The plaintiff is urging a result which is virtually the opposite of the position taken by her counsel at trial and the verdict of the jury. We submit that such a result would promote uncertainty, increase gamesmanship and lessen public confidence in the judicial system—exactly the type of problems contribution was designed to eliminate. Such a result would be grossly unfair, and would be inconsistent with the aims of justice and the spirit of the due process provisions of the Illinois Constitution and the 14th Amendment of the United States Constitution.

WHEREFORE, the defendant, St. John's Hospital and Dr. Shari Fitzgerald respectfully pray for this court to enter an order reversing the order of the trial court and entering a judgment in favor of the plaintiffs and against the defendants in the amount of 7%, plus interest through April 4, 1988, and for such other relief as this Court deems just.

APPENDIX 13

Petition for Rehearing of St. John's Hospital and Dr. Shari Fitzgerald (filed in the Illinois Supreme Court)

Re: Henry v. St. John's, et al.
No. 68659

* * * * *

This Petition for Rehearing should be granted because: (1) this Court has seriously misapprehended the facts; (2) this post-judgment settlement, contrary to the jury's apportionment, is not in good faith; (3) this decision is directly contrary to the public policy considerations underlying the Contribution Act; and (4) constitutional due process considerations preclude the inequitable result the Court has reached in this case. Because of these inherent flaws in this Court's opinion, defendants respectfully request this Court to allow rehearing in order to reconsider their decision.

* * * * *

V. CONSTITUTIONAL CONSIDERATIONS REQUIRE A REHEARING.

Simply stated, the defendants have been denied the fundamental Due Process right guaranteed by the Fourteenth Amendment of the U.S. Constitution, as well as by the Illinois Constitution, to a trial by jury.

This case was not tried on the basis of the rule that each joint tort-feasor is responsible in full for the entire damages of plaintiff. Plaintiff offered the jury instruction requiring apportionment and all agreed that instruction was appropriate (C. 2512). Neither the plaintiff nor any other party offered I.P.I. (Civil) 41.04 instructing the jury that their verdict must be one single sum rather than an allocated verdict.

The jury was clearly instructed on the apportionment principles and rendered its findings in reliance of its instructions, one finding being that St. John's Hospital was 7% responsible. When the trial court fails to follow the jury verdict, and rather increases the verdict from 7% to more than 60%, from the sum of $715,000 to $5,511,759, without the consent of the party affected, an attempt to do so is violative of constitutional guarantee of a trial by jury.

The situation in the instant case is similar to that of *Koltz v. Jahaaske and Reher*, 312 Ill. App. 623, 38 N.E.2d 973 (1942). Two plaintiffs, George Koltz, the driver, and Louise Koltz, a passenger, recovered for injuries suffered at the hands of defendant, Jahaaske, a driver of the other vehicle and Lawrence Reher, the tavern keeper, who sold alcohol to Jahaaske. These defendants were sued as joint tort-feasor. The jury returned four verdicts:

(a) Louise Koltz against Jahaaske, $15,000;

(b) George Koltz against Jahaaske, $4,000;

(c) Louise Koltz against Reher, $500;

(d) George Koltz against Reher, $500.

Following the verdicts, both plaintiffs asked the Court to amend the verdicts for Louise to be $15,000 as to Reher (not $500) and George to be $4,000 as to Reher (not $500). The trial court agreed.

On appeal, the Court stated:

> . . . [a] trial court is without power to arbitrarily increase the verdict of a jury in a tort action which is based upon unliquidated damages, without the consent of the party to be unfavorably affected by *such increase*. The reason for the above rule is that such action on the part of the court in arbitrarily reducing or increasing the damages fixed by the jury in its verdict without the consent of the party unfavor-

> ably affected by such increase or decrease *would be violative of the constitutional guaranty of trial by jury. Koltz v. Jahnaske and Reher*, 312 Ill. App. 623, 38 N.E.2d 973 (1942) (Emphasis added).

Here, too, the action of the court in increasing the verdict against St. John's contrary to the jury's determination is violative of the constitutional guarantee of trial by jury.

The function of the jury was to fix the damages as to St. John's Hospital, which it did. Plaintiff chose to instruct the jury on apportionment (C. 2512). The jury followed those instructions. This plaintiff chose not to instruct on, nor to argue to the jury, the applicability of the joint tort-feasor rule, i.e., that each joint tort-feasor is responsible to plaintiff in full (I.P.I. Civil 41.04).

Based upon the small amount of negligence attributed to St. John's, and the complete absence of punitive damages, it is probable that the jury would have returned a not guilty verdict in favor of St. John's when faced with the possibility that St. John's could bear the entire burden for the primarily culpable defendant. It is without doubt that the jury never contemplated the result now reached by the Court in this case.

The United States Supreme Court in *Dimick v. Schiedt*, 293 U.S. 474, 79 L.Ed. 603, 55 S. Ct. 296 (1935) used the same analysis. The actions of the trial court resulted in the denial of the constitutional right to a trial by jury where the trial court granted an additur, increasing the jury verdict from $500 to $1,500. The United States Supreme Court stated:

> . . . [T]he power to conditionally increase the verdict of a jury does not follow as a necessary corollary from the power to conditionally decrease it. . . . [Where] no jury has ever passed on the increased amount,

> . . . the practice has no precedent according to the rules of common law.
>
> . . . Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. (citation omitted)
>
> The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. . . *When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'* (Emphasis added) *Dimick v. Schiedt*, 293 U.S. 474, 485-86, 79 L.Ed. 603, 55 S. Ct. 296 (1935).

When the parties present to a jury the factual issues they are to resolve, including apportionment, instruct the jury as to the consequences of their findings regarding relative fault, and the jury speaks to those issues, their findings are final and should not be disturbed; to simply rearrange that verdict is to deny to this litigant its fundamental right to a trial by jury.

The care with which jury verdicts are to be handled to insure that their intent is effectuated is found in an-

other early U.S. Supreme Court case, *Washington Gas-Light Co. v. Lansden*, 172 U.S. 534, 43 L.Ed. 543, 19 S.Ct. 296 (1899).

That court stated:

> At any rate, the jury has never been called upon to render a verdict against a sole defendant; and while it may be said that, whether against one or against all the defendants, the plaintiff suffers the same damage, and should be entitled to a verdict for the same sum, still the question arises *whether a jury, in passing upon the several liability of the individual defendant, would give a verdict of the same amount as it would if both the other defendants remained. We cannot say it would, and as the jury has never rendered a verdict against Mr. Leetch individually and solely, and as the case is one where damages are so largely in the sole discretion of the jury, we think it unjust and improper to permit this verdict to stand* against Leetch alone while we set it aside as against the other defendants. (Emphasis added). *Washington Gas-Light v. Lansden*, 172 U.S. 534, 43 L.Ed. 543, 19 S.Ct. 296 (1899).

The only reason for the jury instructions is to frame the issues and to announce the principles of law applicable to the case in order to assure proper resolution by the jury. *Warnes v. Champaign County Seed Co.*, 5 Ill. App. 2d 151, 156, 124 N.E.2d 695 (3d Dist. 1955). This jury was clearly and unequivocally instructed on the applicable principles of law, including the fact that the jury was to apportion responsibility between the defendants according to their relative degree of fault. The resolution of the issues as determined by the verdict should be given its intended force and effect. For this Court, subsequent to and contrary to the verdict, to sanction the alteration of the jury's findings is an unconstitutional denial of these defendants' right to a trial by jury.

The purpose of the Contribution Act is to achieve equity among joint tort-feasors. If one looks only to the language of the statute, as the Court has here, the statute is unconstitutional as applied. In order to avoid reaching an unconstitutional result, it is then necessary to reexamine the statute in light of its intended purpose. When the statute is examined in light of its intended purpose, the necessary conclusion must be that the General Assembly did not intend the result reached here. It cannot have been intended that a post-judgment settlement contrary to the jury's apportionment will bar contribution.